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Supreme Court of the U. S.

October Term, 1884.

No. 480.

CALVIN A. STEVENS,

vs.

CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD COMPANY,
ILLINOIS CENTRAL RAILROAD COMPANY.

APPEAL FROM WESTERN DISTRICT OF TENNESSEE.

JOHN A. CAMPBELL,

For Appellee.

J. A. Campbell

JOHN MURPHY & CO., PRINTERS, BALTIMORE.

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STATEMENT OF THE CASE.

The Chicago, St. Louis and New Orleans Railroad Company, before November, 1877, had become the owner of the railroad from New Orleans to Cairo by purchases made at sales ordered by Courts of the United States in Louisiana, Mississippi, Tennessee and Kentucky, in suits commenced by the mortgagees and creditors against the railroad corporations who were in possession as owners of the property, and were mortgagors and defaulting debtors. The answer furnishes information of the manner of the formation of this company, but no question arises on this subject. Before the pendency of the suit against the Mississippi Railroad

Company, and others, the State of Tennessee had occupied the section of railroad from the line of Mississippi to the line of Kentucky, across Tennessee, as a debtor of that State for 1,199 bonds issued to the company or companies under the conditions of the internal improvement acts, and for a sum of interest which had not been paid before that date. A receiver had been appointed by the Governor, and this receiver was the manager of the corporation on the 28th November, 1877, under that authority. Ans., folios 43–45. Pursuant to the statute passed the 25th February, 1869, and on the 28th November, aforesaid, three trustees presented to the treasurer of that State the written consent of the defendants that these trustees should settle the debt of the railroad corporations with the State, under the sixth section of the act aforesaid. The Governor certified that the three trustees had delivered the requisite number of State bonds of the proper character, (1,199) in liquidation of the debt of those corporations, and they had been accepted. That these trustees had presented a series of eleven hundred and ninety-nine bonds of the corporation, secured by a mortgage of the company on the same property which had been covered by the lien of the State, and that this lien was then assigned and transferred to those trustees to secure those bonds thus presented, under the authority of that act. Ans., Exhibit 4. The bonds thus secured are of the same quantity and quality of those surrendered.

II.

The plaintiff alleges he is the owner of bonds which had been issued to the Mississippi Central by the State. All of the bonds issued by Tennessee are similar. They were all printed on the same plate, I find stated as a fact in one of the briefs. They are each for $1,000. The semi-annual interest is the same, and is payable on the same days of each year; and they mature on the first of January, and are dated on the first of January. The coupons are all alike, and the State is the only promissor. There is no

payee named on any. The faith of the State is pledged in all bonds, in the same terms for the payment by the State.

The bonds are numbered and letters are used to designate a series. No endorsement, guaranty, pledge, or promise, is shown by any holder from the corporation receiving them. Nor has the State taken from any railway corporation, more than an acknowledgment that the company had received bonds of the description contained in the receipt at the date of the delivery. There is no testimony to show of the payment of the interest to any holder of bonds by the company, on his demand, or claim to have payment from the company. The State collected the interest and in this case there is an instance of a collection by the receiver appointed by the Governor, who paid the sum into the Treasury of the State. He collected interest due on 1,199 bonds, but at that date 261 bonds, of the series issued to the defendants had been paid into the State Treasury and had been cancelled. This surrender of these bonds was made by other persons and not by the company which had borrowed them.

The obligation of the contract of the borrower remained in full force. The contract implied a duty to return the same bonds, or bonds of a like character and description, or if these cannot be obtained then their value.

III.

The plaintiff prosecutes this class of suits upon an interpretation placed on the third and fourth sections of the act passed by Tennessee, "To establish a system of internal improvements in the State," approved 11th February, 1852, which in his opinion sanctions a law suit. The system of the State comprised some fifteen corporations designated in the act of 1852. An act of 1854 admits ten other corporations, among them, the Mississippi Central Railroad Company. Upon the submission of proper proofs, bonds for $8,000 per mile might be issued for sections of thirty miles which were suitably prepared. This allowance was increased to $10,000 by

an act passed in February, 1854. The first nine sections of the act of 1852 apply to one corporation, and all of the legislation is single and applied to that one corporation. The 10th section puts twelve other corporations upon the same footing, and the slovenly sections of 15, 18, 19, introduce others. The conditions of the act are that each corporation should be able, with valid subscriptions for stock, to complete the entire railroad, except the superstructure and equipments. Aid was given to the companies by the State, upon proof of this sufficiency to the Governor, that the company had fulfilled the conditions, as stated in the first and second sections of the act. These were of ability to prepare the road projected, and the actual preparation of the first section of the road for thirty miles.

The bonds issued upon the first section, and the bonds issued upon the preparation of succeeding sections, till the last, impose sectional liens on the sections.

Upon the completion of the railroad, the State of *Tennessee shall be invested* with a lien, without a deed from the company, upon the entire road, including the stock, right of way, superstructure and equipments, and on the property owned by the company or incident for and necessary for its business, *for the payment of all of said bonds issued to the company, as provided in this act, and for the interest accruing on said bonds.*" The section proceeds to declare that after the first issue of bonds to the company "it *shall not be lawful for said company to give, create or convey to any person or persons, or body corporate, whatever,* any lien, incumbrance, mortgage of any kind, which shall have priority over, or come in conflict with, the lien of the *State herein secured*; and any such lien, incumbrance, or mortgage shall be null and void as against *said lien of the State,* and the said lien or mortgage *of the State,* shall have priority over all other claims existing or to exist against said company."

The *tenth* section of the act altered the character of the entire act as it was before that section came in, by the introduction of

twelve corporations besides, and we find here the first development of the *system* for internal improvements in the State. The *twelfth* section testifies, that the General Assembly realized that what had gone before would not serve for the purpose of security nor regulation and that conservatory measures must be adopted. This section is: "*Be it enacted* That the *State of Tennessee expressly reserves the* RIGHT to enact by the Legislature thereof, hereafter, all such LAWS as may be deemed necessary *to protect the interest of the State* and to secure the State against *any loss*, in consequence of the issuance of bonds under the provisions of this act. But in such manner as not to impair the vested rights of the stockholders of the company."

These sections relate to the original negotiations between the State of Tennessee and the railway corporations, and their intercourse during the period commencing when the corporation received the first loan of the bonds of the State, and ending with the completion of the railroad and the delivery of the last instalment. They invite an inquiry of some importance in the solution of the questions in issue in this suit, as to the signification and the result of the negotiations and intercourse. What relations were established?

IV.

Conventional Arrangement of State with Company.

We find that the State of Tennessee habitually regarded the railway corporations as a borrower of her bonds. In the records of the administrative department of the State, the bonds issued to the corporations are denominated loaned bonds of the State of Tennessee, bonds loaned to railroads, liabilities of the State for loans to railroads. The railroad corporations are charged for the amount of bonds loaned.

In the code of Tennessee and the statutes, the expressions relative to the companies are indebtment for bonds issued to the companies, or bonds loaned to the companies by the State. The State claims an indebtedness as arising from such loans or issues.

In the act of 1859–60, ch. 93, s. 9, the comptroller of the State is directed to keep a regular account *against* each company, or corporation, charging them with the amount of bonds originally issued to said company by the State, and crediting them with the amount of sinking fund paid, and shall furnish the treasurer of the State a statement of the amount due by each company on the first day of June and December of each year, that he *may know how much interest each company has to pay.* The seventh section of the same act provides that the sinking fund, when paid in all cases, shall be passed directly to the *credit* of said *company* or corporation, and be a RELEASE to the said *company* or corporation from that *amount due by them to the State.* The commissioners shall issue a receipt to each company or corporation for such PAYMENT, retaining a duplicate in a well bound book kept for that purpose." The manner of the *payment* is stated in the fifth section of this act to be "*in cash,* or in the *like character of bonds,* that may have been issued or endorsed by *the State* for said company at their face or par value." The word *payment* in this act is significant when we consider the nature of the contract between the State and the corporations. It cannot be said that a *loan of bonds* is the same as a *loan of money.* Money has for its destination a rapid circulation as a measure of values, and a ready convertibility into coin. The State of Tennessee expresses consciousness of this in prohibiting *a sale at less* than a *par value,* and in a reservation of a faculty of oversight of the *sale,* to prevent any jobbery.

These bonds are so far merchandise, as that they are vendible; they may be sold privately or at a stock exchange. But it cannot be supposed they were to be merchandise created to be a subject of speculation. They were issued to serve as an investment, and to be purchased and held by persons who have money for that purpose, and in course of time to be returned and destroyed by the obligor. This contract of loan is one known to the law, and is described as a contract where a certain quantity of things of any

kind are delivered by one to another, with the transfer of the right of property, under the obligation to restore the same quantity of things of the same kind and quantity, but *not the identical things.* The borrower acquits himself when he restores the things lent in the same *quantity* and quality at the time appointed.

When contracts of this kind were common, the things which were subject to this contract were those *quae pondere, numero, et mensura constant.* Savigny says of the issues of a State payable to bearer, that they are in fact *true quantities;* that is, things which have no individual value; (*i. e.*) peculiar value as an individual thing. As for example, one obligation of a State has absolutely the same value as another of the same kind and the same quantity. In this point of view these securities are exactly like money, except we must keep in mind the difference in destination. Only it is more difficult to recognize differences in coin. Commonly each separate paper bears an individual mark, by means of numbers and letters; but we, therefore, place them in the same rank as paper money, where such marks are to be found.

2 Savigny des Ob., s. 64.

When the State of Tennessee then defined her principle for recalling her bonds from the market, and provided for the cancellation of the bonds, there is no ground for blaming her for the adoption. The legislation was fully in the spirit of the contract between the State and the corporation. The one interest and policy of the State was to have the bonds cancelled; and whether the cancellation was of one bond, one series, or of another, was a matter of indifference to the *State of Tennessee.* Her obligation in all was the same.

V.

The Convention of the State with the Railroad Companies.

The arrangements of the State of Tennessee became complicated by the fact that upon each of her bonds there are semi-annual

payments to be made every year for a period of thirty or forty years. For these payments the act of the Legislature depended upon the respective corporations to furnish the money needful, and to pay the expenses incident to making this payment—whether commission or exchange. An account was kept with the corporations, showing the debt. The comptroller, a month before the interest was payable, stated the account of each company to the treasurer, and the treasurer made the requisition on the company for the sum necessary. It appears that the bank or the treasurer might deal with a corporation, and if the corporation had coupons in hand due at any day, the corporation could deposit them, or arrange with the treasurer. The management of this portion of the arrangement is similar to the arrangement between the person accommodated and an accommodation acceptor of a bill of exchange.

The person accommodated should place the acceptor in funds to meet the bill. The bonds issued were executed by the State. The coupons were warrants by comptroller on the treasurer of the State. Payments were to be made at a distant city. The payments embraced interest upon all of the issues of bonds which had been made by the State for railroads or other cause. These were all paid to the holders of the bonds in New York by the treasurer of the State, or his delegate, the Merchants' Bank. The argument of the plaintiff is that the lien of the State, as described in the fourth section of the act, was for *the payment of all said bonds issued to the company*, as *provided in the act, and for the interest accruing on said bonds;* that the *payment* intended by the act was a payment to the holder of the State bond, and that no other payment will extinguish his claim on the company and its property, however faithfully paid by the company to the State.

But we find that the State, in the fifth section, effectually *prescribes as law* to the corporations in what manner and to what person payment of the interest is to be made. The payment was to be made into the treasury, so that the treasurer might pay the coupon, on its presentation, in New York. In case that this sum

was not paid as required, the Governor was directed to appoint a receiver to take possession of the property, and to manage it, until the sum needed was collected. The corporation was charged to pay the expenses of this management. In 1876–7 the conditions of the mortgages made by the Mississippi Central Railroad Company had been broken, and suits for foreclosure had been commenced in the Circuit Courts of the United States. Those Courts had appointed receivers, but there was a paramount title, and those receivers had to submit to the State's superior right. We heard nothing then of the lien of the holders of Tennessee State bonds, nor that the lien had been divided and scattered in every direction. The submission was made to a lien that was prior—that no other lien was to conflict with it; that all others were null and void in face of this one.

The receiver held the railroad and paid into the treasury of the State all of the interest which had not been collected before.

The State had treated this corporation as a borrower of 1,199 of her own bonds, and had made a law that the corporation must pay her the interest on the amount of the bonds borrowed from her.

The corporation was not a debtor on those bonds, and the draft in the coupon was not obligatory on the corporation nor demandable by the holder. If the proper construction be that the corporation shall provide the money needful to the State—to supply the State on the contract of loan, and according to the act, the same conclusion must be adopted in respect to the bonds themselves. The State is invested with a lien by her sovereign declaration, without a deed, and this lien is invested for the payment of bonds she had lent to the company. The lien was invested simultaneously with the delivery of the bonds to the company, before their negotiation or sale. No other parties to the convention existed at the time. This lien is to remain prior and paramount for the payment of the bonds. The bonds were not the bonds of the corporation, but of the State herself. The promise of the State in the bond is that of the State alone; her faith is pledged

to the holder, irrevocably, to make the payment according to the tenor of the bond. The obligation of the company as a borrower of the bonds, is to return a like number of bonds, of the same quality and sum, or to pay the amount in money to the State when the time appointed shall come. The act makes no provision for intercourse with the holders of the State bonds, by the corporation, nor when and where they shall meet—on the other hand, the State directs all of the obligations and duties of the corporations, and has provided measures to redress every default.

VI.

We are fortunate in having in this case facts which illustrate so clearly the practical administration of the acts of Tennessee. The Chicago, St. Louis and New Orleans Railroad Company is the product of chancery suits for foreclosure of mortgages, of processes of reorganization, consolidation after expensive receiverships.

When the creditor for millions of the bonds had gone through this ordeal and had come to obtain possession, he finds Tennessee in possession of the railroad within Tennessee to collect interest unpaid on 1,199 bonds loaned many years before to the Mississippi Central Railroad Company, to aid in the construction of the road. The testimony shows that all of this interest was thus collected.

The interest was collected on the amount of the loan, $1,196,000. These plaintiffs say that the State should have collected coupon after coupon of the original issue, and any other collection is nugatory. But it appears that of the issue to this corporation, several hundred had been withdrawn by payments made by other corporations, and that such bonds had been cancelled. This payment did not enure to the benefit of the debtor corporation, nor to its successor. The debt was for a loan of a certain number of bonds. This debt might be paid in these bonds, or in like bonds, or in money, and until payment is thus made the debt remains, and Tennessee was fully authorized to collect the interest upon the amount of the bonds loaned.

The act of 1852 made a provision for a sinking fund.

The object of a sinking fund is to re-imburse the capital of the debt. In the bonds of Tennessee there is no obligation to pay the bonds before their maturity. It is a measure of prudence to make provision. The State does not reserve an authority to call in the bonds.

The mode of employing this sinking fund must be by a purchase of bonds. In the seventh section of the act of 1852 the State provides that five years after the completion of the railroad, one per cent. per annum on the amount of the bonds shall be paid into the State treasury by the company, in the form of bonds of the State, and as between the State and the company the bonds so paid shall be a credit on the bonds issued to the company. The State provides in this section for the compulsory execution of this section, as in a case of default in the payment of interest. In February, 1856, the companies receiving bonds were required to pay two per cent. annually on all the bonds to the treasurer of the State as a sinking fund, five years after the date of the bond. The Governor, Comptroller, and President of the Bank of Tennessee were to control and manage this fund. Laws of Tenn., ch. 120, p. 144, 1855–6. In the acts of 1859–60, ch. 93, there is a special act for the equalization and investment of the sinking fund. This act directs that the money or bonds paid into the treasury by any corporation shall be passed directly to the credit of the corporations paying the same, and be a release to corporations for that amount on the debt due by them to the State of Tennessee.

The sinking fund was increased to two and one half per cent., payable on the first day of April and November, five years after the date of the bonds. The seventh section renews the command that the payment be passed to the credit of the company, and be a release from that amount due by them to the State. The ninth section directs that the company shall be charged with the amount of the bonds, and credited with the payments to the treasury as sinking fund.

There is nothing ambiguous in these enactments. The State plainly manifests that she understood the relation of the State and the company to be that of a lender and a borrower of bonds. The borrower was to return money or bonds to the State both for the interest and for the principal.

The act of 1852 contains another section which illustrates the same condition of policy and purpose. The sixth section of the act states the case of bonds being due and not paid—"*if said company shall fail or refuse any of said bonds when they fall due.*"

The obligation of the company to pay is here declared, the question is to whom payment is to be made; who is gravelled by the failure? It is the State of Tennessee. The Governor must notify the Attorney-General to file a bill in the name of the State in the Courts of Tennessee. The Court was to make all such orders and decrees *in said cause* as the Court deems necessary to receive the payment of said bonds, with the interest thereon, by the appointment of receivers and ordering a sale of the road, property, and assets, as the Court deems best for the interest of the State.

It will be seen from this analysis of the acts, that *payment* in all cases signifies payment to the State. That payment in no case signifies a payment by the corporation, of the bonds of the State, to any holder of such bonds.

The corporation and the holder of the bonds of the State are strangers; the State has in every case interposed herself to keep them apart. In every possible case, the State of Tennessee has maintained control, direction and management of all of her business relations with the corporations, to the entire exclusion of the owners of the bonds, which the State had issued. A case in the Court of Cassation, decided in 1850, is analogous to this, and serves to illustrate it. A lent to B one hundred of the issues (actions) of the Northern Railroad Company, with authority to sell them, and with obligation to restore them in 18 days. The borrower failed to restore them at the time, and after much delay suit

was brought by the lender. The borrower offered to restore them then, but the issues had depreciated, and the lender would not receive them.

The Court of first instance adjudged that the tender should be accepted, and that the borrower should pay as *damages* the difference in value between the date of default, and the tender in Court. The Court of Cassation said the borrower should have restored actions of the same *quality*. What is the quality of the industrial actions? The actions have no other quality than that of current value on the day when restitution should have been made. The borrower, not being able to render those of the same value, he ought to pay in money the value they had when restitution should have been made.

Dalloz, 3 June, 1850, 1, 201.

Laurent, commenting on this judgment, denies that the quality of an action is the same as kind. The borrower owed the issues of the Northern Railroad. He should have paid by returning those issues. Whether the actions rise or fall, their identity remains, and restitution should be made of the same nature.

26 Laurent, droit Civ., s. 508.

In the system of practice in this country, the suit would, probably, have been brought for damages, and the recovery would have been the value when restitution should have been made. The law of the contract was, that restitution might be made in kind, and this is the rule adopted in the act of 1860, which defines the mode of payment of the sinking fund to the Commissioners, Governor, Comptroller and President of the Bank in Tennessee.

VII.

The sixth section of the act of 1869, providing for the liquidation of the State debt, contracted in aid of the railroad companies, under which the settlement was made between the State of Tennessee and these defendants, was made in 1877, proposes a nova-

tion of the debt. The section exacts (1) the consent of the board of directors of the debtor corporation to the payment of the indebtedness of such railroad corporation by any person or corporation; (2), that this person or corporation shall pay such indebtedness in the bonds of the State; (3), the State will substitute the person or corporation to all the liens of the State, against the company, for the payment of the debt of the State had, or has by law, and the Governor and Secretary of State shall give such party a certificate, which shall be evidence for him.

There was no interest in arrears, as in the case of the Mobile and Ohio Railroad Company, and which was settled under the second section of the act of 1870. In a novation of an old debt for a new, the old debt is extinguished by the new one contracted in its stead. The State of Tennessee received 1,199 bonds of the same species, quality and obligation, for those she had loaned to the predecessors of the defendants, who borrowed them from the State. The State was satisfied—paid.

The trustees who paid the bonds to the State and received the substitution to her liens and demands against the debtors, these debtors have a new creditor—the Illinois Central Railroad Company, the owner of the 1,199 bonds of the defendant, with this lien appended to it.

In the classification of Pothier, it is of the third class; the third kind of novation takes place by the intervention of a new creditor, where a debtor, for the purpose of being discharged from his original creditor, by the order of that creditor, contracts some obligation in favor of this new creditor.

Evans, Pothier, p. 340, side page 549.

Pothier in discussing what persons may make a novation, says: *The consent which the creditor gives to the novation of the debt, being equivalent, so far as regards the extinction of the debt,* to a payment of it, it follows that only these to whom a *valid payment can be made can make a novation of a debt. Vice versa,* a person to whom

a debt may be paid may likewise, in general, make a novation; *cui recte solvitur is etiam novare potest.* In like manner a tutor, curator, a husband may make a novation; as may a person having a general procuration.

Evans, Pothier, 343; *i. e.* 555, side page.

The issue between the plaintiffs and these defendants starts with the presentment of this question. It is a fact in this case that this corporation was not behind, in respect to interest, the 28th November, 1878; and when this suit was commenced the demand of the State had been released to her. The plaintiff has no evidence of indebtment against the defendants nor their predecessors in the ownership of the railroads. They have no mortgage, lien or other incumbrance.

They only hold bonds of Tennessee with a promise of payment by the State.

We have examined the testimony afforded in the statutes of Tennessee to ascertain the contractical relation between the State and the company, and it appears that the State considered herself a lender of bonds, the precise equivalent of money, and that the only debt the companies owed was the debt incurred because of that loan to them. Among the acts of Tennessee we find, that at first, the loan of eight bonds per mile was allowed, and afterward the sum was increased to ten bonds per mile; a complete section in the act of 1852 was thirty miles for the first, and twenty afterward; then the alteration was that issues should be made on the completion of twenty miles, and ten miles. The original act required that the road should be "bridged and graded and ready for the reception of rails." Large appropriations were subsequently made of bonds to build bridges, and these are all subject to the same conditions and are comprehended *in the lien of the* 4th section. But if every State bond constitutes a lien on being issued, and the purchaser of that bond acquires a lien on a section, and afterward participates in the general lien, this legislation is unintelligible.

What power has the State, by successive statutes, to crowd issues upon issues to constitute identical liens on the road—the last issues to have the same value as the first? But the State did not regard the holders of her bonds as creditors of the companies, and that consequently no right nor estate of theirs was injured or impaired. These are only a few of the instances of direct assertion by the State of the want of any connection of HER creditors. The holders of these improvement bonds, with this lien, and her entire ignorance of the relations they impute to her as existing at the date of these suits. When the State of Tennessee delivered in May, 1856, and in November, 1856, her bonds, and subsequently till the number of 1,199 bonds were received, independently of any lien, mortgage, or other accessory obligation, there was a direct liability imposed on that corporation, enforceable at law. The bonds were not delivered as a donation or subsidy. The acts of 1852, of 1856, of 1860, and of 1869, all refer to some obligation never formally drawn out and signed, but implied in the fact of the receipt of the bonds by the corporation. This contract, in respect to the mode of performance, is designedly kept open for such legislation as the State might find it necessary to make.

The bonds delivered are intended for sale, and are in a fitting form for sale in the market, without any complication. No party is designated to transfer the bond; it passes by delivery. The contract of the bond has the two parties—the State and the bearer. There being no sale, exchange, letting, deposit of the bonds to the railway corporation, we readily admit, as the State denominates it, there was a loan of bonds to this company. It is not a loan for temporary use, and to be returned in specie, *i. e.* the identical bonds. The bonds are designed for sale, and for circulation, and the negotiation of the bonds might have been assisted by an agent of the State, so that their destination should not be perverted by the corporate officers or agents. The convention between the State and corporation is a convention founded on the loan of State bonds, and on this foundation their relations rest. But we do not assume that

the technical contract is defined or adopted in all of the dispositions which make parts of the convention. There were a large number of borrowing corporations, whose works would not be completed, and be productive for some years. Provision was necessary for the payment of the interest to accrue on the bonds during this period of preparation and of feebleness on the part of the corporations. The State exacted from the corporations a specific security by the fifth section of the act of 1852, for the payment of the interest semi-annually. This interest appeared on the bonds in the form of drafts by Comptroller upon the Treasurer each for thirty dollars; there were 1,199 drafts every six months, for thirty dollars each ($35,970), to be provided for. The State observing that these are drafts, and that she has made them without receiving value in order that the corporation may obtain money, applied to this part of the liability she incurred the law in favor of an *accommodation party*. The person *accommodated* must supply to the *accommodation party* the money to meet the demand with commission and exchange. The more permanent and important subject, the bonds, the contract of loan is, that a certain number of bonds of the same amount, number, and character, shall be restored to the lender, and in case of a failure, that compensation in money may be recovered.

It is not a part of the contract that the identical thing shall be returned or provided.

2 Savigny, des Ob., sec. 72, Mutuum.
36 Dalloz, Jurisp. Gen., p. 795, sec. 193; p. 793, sec. 139.
4 Pothier, du prêt de consomption, pp. 48–64.
Termes de ley, 73, bailment.
Doctor and Student, ch. 38.
Story on Bailment, secs. 283, 370.
Add. on Cont., 514.
Chase vs. Washburn, 1 Ohio St., 244.
Gilpin vs. Howell, 5 Penn., 41.
Fosdeck vs. Greene, 27 O. St., 484.
Hurd vs. West, 7 Cowen, 752.

Smith vs. Clark, 21 Wend., 83.
South Aust. In. Co. vs. Randell, VI Moore P. C. 341.
Mallory vs. Willis, 4 Const., 77.

It is when money is abundant, intercourse rapid, that the circulation of commodities is promoted with facility upon a pecuniary basis. The State of Tennessee, and many of the new States in their early stage of settlement, depended upon exchange and not sales. In respect to another principle apparent in the fifth section of the act, the engagement of a person accommodated by a bill or note of an accommodation party, as implied, is that he will provide funds for the payment of the bill or note at maturity; and that if, owing to his omission, the accommodation party is compelled to pay the demand, he will re-imburse such party with costs and expenses.

Chalmers on Bills, Art. 229.
Sleigh vs. Sleigh, 5 Exch., 514.
Baker vs. Martin, 3 Barb., 634.

In the administration of these statutes, one or other of these rules are observable, as they are in the statutes themselves. The seventh section, relative to sinking fund, in the act of 1852, and the statutes enlarging and developing the principle of the sinking fund, which followed the first statute, this is apparent. The assessment for a sinking fund in that section was to commence five years after the completion of the road. It is probable that no collection was ever made of this fund, under that section, from any company. The *earliest* issue of bonds to the Mississippi Central Railroad Company was the 22d May, 1856; others in November, 1856; some in 1857. Three acts were passed after the war, allowing issues to her. Record, pp. 611–616.

In February, 1856, an act was passed to increase the sinking fund to two per cent. This sum was to be paid to the treasurer of the State. The payment was to commence five years after *the date of the bond.* The Governor, Comptroller and President of the

Bank of Tennessee were to form a board of control and management. This act preceded the issues to the Mississippi Central. In March, 1860, the act for *equalization* and *investment* was adopted. The fifth section is: "*Said companies or corporations may pay said sinking fund in cash, or in like character of bonds that may have been issued by the State for said company, at their face and par value.*"

Section seven is: "The sinking fund in all cases shall be passed directly to the credit of said company or corporation, and be a release to said company or corporation from that amount due by them to the State. Such bonds are to be of the same character as those issued to the said corporation."

Section nine is: "The Comptroller of the State shall keep a regular account against such corporation, charging them with the amount of bonds originally issued to said company or corporation, and crediting them by the amount of the sinking fund paid, and shall furnish the treasurer of State a statement of the amount due by each corporation on the first of June and December of each year, that he may know how much interest each company or corporation has to pay." Record, Exhibit D., pp. 30, 31.

VIII.

The examination we have made is of the statutes of Tennessee enacted prior to the commencement of the war in 1861. In none of those is there a premonition of that event nor of the consequences to result. The Mississippi Central Railroad Company had to sustain a full share of disaster and damage. The principle we have traced in the acts of 1852, 1856 and 1860, of the payment of the public debt by the return of bonds of the like character, was not adopted because of necessity, but as a sound principle of State economy, just to the State, not wrongful to the corporations. It was an exertion of power, a claim of right, the result of which would have been a redemption of all of the bonds long before their maturity. The sixth section of 1856 cited, provided the means of enforcement. One of the first acts on the subject of the debt was

anticipated them. R. P. Neely states he took possession of the Tennessee division on the 27th of February, 1876, and he remained there until the 28th of November, 1877. Record, p. 282. This date is the date of the payment of the entire indebtment of the corporations to the State, as shown by the Comptroller's books. Neely says "he paid into the Treasury of the State one hundred and ten thousand dollars, the whole of the arrears of interest, not paid by the corporation."

It appears in this case that some two hundred and fifty bonds, of the specific issues made to the Mississippi Central, had been delivered to the State by other companies and were cancelled.

No reference to such cancellation was made in the accounts of the comptroller with the Mississippi Company for the loan of bonds. But no reference was necessary for any business purpose. The loan of the State of bonds to the company was evident, and none of the debt for the loan had been paid by the company. It is in proof in this case that several hundred had been lost through the misconduct of a New York firm, but the State had parted with the bonds, and the Mississippi Central had to bear the loss as the owner and borrower. In November, 1877, the State had possession, might continue to hold possession for the sinking fund, and proffered, as she had done for near ten years, to novate the debt. Acceptance would liberate the State from the payment of one million, one hundred and ninety-nine bonds for a like sum of money, expressed in bonds of a like obligation, and in the same number of bonds, at the same rate of interest, and due at the same time. The State had said for nearly ten years such a payment would extinguish the debt.

IX.

All of the settlements enumerated in the record (p. 46) are impeached by a single plaintiff, who assumes the entire responsibility, and claims the entire legal interest in the suits. The bill in this suit discloses the ownership of six bonds, having an aggregate of

coupons unpaid between 1st January, 1876, and 1st January, 1879, both inclusive, $1,260.

Now, it appears that Neely, on 28th November 1877 previously, had paid $110,000, the sum due at that date, upon the entire issue of 1,199 bonds to the company. The plaintiff testifies that he never applied to the railroad companies to pay his past due coupons prior to bringing this suit, nor did he ever notify them that he claimed to hold a lien on their property prior to the bringing of the suit. We assume that his statements, for the purpose of the discussion, to be true.

The question to be decided is, did the State of Tennessee have the power to novate the debt, or accept payment of the debt, which the Chicago, St. Louis and New Orleans Railroad Company, as succeeding the Mississippi Central Railroad Company, acknowledged to be due to the State as borrower of her bonds under the acts of 1852 and 1856.

We have stated the facts, as existing in the records of the public offices of Tennessee. The relation between the parties—the State and the company—is that of borrower and lender of bonds; creditor and debtor in a contract of loan of public securities.

We find that the Treasury books are kept under the legislative direction since 1860, but do not differ from what was before the habit of the offices. We find in the same offices, that the bondholders are not mentioned as creditors of the corporations, nor as parties having any claim on them. The funds collected from the corporations are *State* funds, dedicated to a general class of issues, called loaned bonds, and not applicable to the payment of issues to an individual corporation, or to a special class issued to any corporation. The statute of February, 1869, is only an expression of the sentiment, universally held in administration, that the corporations owe to the State the amount of the bonds loaned; not the same bonds, but bonds to correspond.

We recur to the law of the relation of borrower and lender, and these acts express that law. In one of the parables, a man of

wealth is described as delivering to three of his servants large sums of money, each according to his ability. The two having the largest sums traded successfully, and reported satisfactorily. The third, and the inferior, seems to have misunderstood the object, and supposed that he was to return the identical talent he had received. Taking an alarm, as having an austere master, he buried it, and kept it safely, and returned the identical talent he received, and said: "Lo, there is that which is thine." The austere master berated him strongly.

The first two understood their obligation to be *mutui datio*, the third his to be *de commodatum*, the same error this plaintiff seems to suffer under.

The former imports an ownership in the property delivered, and with full powers to consume it or sell it. The latter imports only safe keeping and certain return. Payment in the last case is complete only, by the return of the same things. Payment in the former, of those of the same kind. The payment of all the bonds with the interest thereon, issued according to the provisions of the act to the Mississippi Central was complied with, *verbum post verbum*, in the settlement made the 28th November, 1878.

The authors of the act of 1852 distinctly understood that the payments to be made by the companies were to the State, and the State only. The bonds of the State were to go forth in the name and credit of the State alone. The State had tried a partnership, or joint interest in improvements; she had indorsed bonds and became a surety; these relations were not satisfactory.

She then determined to become a creditor with sovereign powers of legislation to secure herself from loss. We find that the result has answered some of her expectations.

The manifest purpose of these acts as understood by the State and by the corporations, and by the bondholders, this plaintiff—owner of six or ten bonds alone—proposes to overturn, *contra totis viribus*.

The plaintiff, upon his examination as a witness, produced ten bonds. He does not state with any definiteness the time when he

became the owner of the bonds, beyond the fact that he had them when he commenced the suit. He states the purchase of two, and the price paid for three—the highest price being $525 a bond with the coupons. One was purchased for $400. When these purchases were made, the fact that the railroad had been seized by Tennessee and had been managed by a receiver for a long period, he had the opportunity to know, and the record shows that the settlement of this claim was looked to with some interest, and when concluded, with satisfaction by the association of bondholders. The letters in the record show this. Record, 299, 740, 741, 742, 743. The mortgage executed by the Chicago, St. Louis and New Orleans Railroad Company, with the Tennessee lien attached as a security, was the precise matter referred to in these letters. This plaintiff declares in his testimony that he has made no demand on the corporations, nor exhibited any claim, nor made any effort to obtain satisfaction from them, except through this bill.

The act of February, 1869, of the State of Tennessee, had remained in force nearly eleven years before the defendants made use of the overture that act addressed to the railway corporations in similar conditions with themselves.

At this time none of the adjustments made had been impugned in a judicial tribunal, although all of the questions arising here had arisen in each settlement made. The holders of the State bonds of Tennessee observed these settlements without intervening as parties thereto, or as objecting thereto. The settlements were made under laws passed by the Legislature affecting subjects of the State, and property interests of the corporations in the State, and the interests of the State, and all submitted and the laws remained. In addition to this, in terms which admit of no diminution or mistake, the right to pass those laws was claimed to exist, and the purpose to pass them made manifest by habitual practice. The plaintiff buys these bonds with knowledge of the conditions existing. He offers bonds to the State upon terms of compromise, and admits he is a purchaser as well as seller of bonds.

The validity of these acts have been recognized in the fact of their enactment by the Legislature of the State, having all the legislative power of the State to support their action. The judicial power of the State has supported them in the administration of justice, and this judgment was made before this settlement in the sales of the insolvent railroads—the accumulated usage under these acts, until the whole of the railroad debt to Tennessee has been extinguished by sale and settlement.

X.

The validity of the act of February, 1869, is determined by all of those indicia which determine statutes to be valid.

It was enacted by a legislature endowed with full legislative authority, and has not been altered or modified in any manner, except to make the principle more explicit and effective. In all cases before the courts it has been accepted. It conforms to principles contained in all of the acts of the legislature. It has been employed in a multitude of transactions of settlements where large interests were involved, without opposition from interested parties. The accumulated evidence of usage and acquiescence and pecuniary investments upon it, all corroborate and strengthen it. None complain save those bondholders who preferred to hold on for a better settlement with the State, and have not been successful.

When the receiver Neely took possession, in February, 1876, the Mississippi Central Railroad Company had lost its identity by a consolidation with another corporation with another name. This consolidation company had not fulfilled engagements to Tennessee either in the payment of principal or sinking fund, and had not expended the money on the road, the State had advanced. One of her agents had perverted 400 of the bonds. The sinking fund had never been paid. In November, 1877, the opportunity for a final settlement had arrived, and the State, the successor to two or three intermediate corporations, had purchased the road under a foreclosure and was willing to extinguish it. No debt existed

against this company, only a lien on the railroad for the bonds loaned to the dissolved corporation. The interest in full had been collected. The question was only of the amount due for bonds lent and consumed; a large number having been run away with. With whom may the corporation deal in this emergency? The railroad is held by the State because the State is invested with a lien, without a deed from the company upon the entire railroad, and every part and parcel of it, superstructure and equipment, and all accessories for the payment of all of said bonds issued to the company, as provided in the act of 1852.

The State, possessed of this lien for the payment of the bonds issued to the company as provided in the act, had proposed, near ten years before, to accept bonds, bonds alike those delivered to the company, and this law was acted upon, none objecting thereto. The payment as proposed is a payment according to the act.

This plaintiff asserts that the bonds themselves are the mortgage, thus none can deal with the subject except he has bonds. The bonds constitute the lien. With the six bonds described in the bill, he proposes to override the decisions of the State, her judiciary and legislature and undo the corporations.

The acts themselves do not show more than a semblance of plausibility to the assertion. The statute of 1852 speaks of the bonds as constituting a lien, but immediately and in describing the lien the statute declares as the consequence of the issue of the bonds, the State of Tennessee is invested with the lien, without a deed for the payment of the principal and interest in the bonds. This language refers to the sectional liens. But all of these fragmentary liens were absorbed and merged into the general and permanent lien described in the last paragraph of the fourth section of the act, which was invested in the State upon the completion of the railroad, and which subject all of property the company has within the State. The State regarded the bonds as the evidence that she had made a loan of a certain sum in bonds to the railway company; that by the issue and delivery of those bonds the relation of bor-

rower and lender had been established for the sum, the bonds so delivered expresses. This issue and delivery of the bonds had the consequence to subject the corporation as a debtor, and to secure her she was, by the declaration of the act, and without the ceremony of the execution of a deed to state the details, she was invested with a lien, for the payment of the bonds—the equivalent, for the payment of the debt created by the loan of those bonds. On this principle, the State has conducted her complicated and embarrassing administration during the thirty years.

The bonds delivered were the bonds of the State. When delivered to the company they became the property of the company, with no condition but that they should not be sold for less than par and the money should be fairly applied to construction and equipment of the railroad. The State was the only promisor—alone, ostensible, and responsible party to pay interest and principal—the only name damaged by the non-payment at maturity of coupons of interest or principal. The State took an investiture of a lien on all of the property and effects of her borrower of bonds, to be held for the payment of the bonds and the interest thereon. Who is to receive the payment is the question? The answer is inevitable—to the lender of the bonds. The lender must make the payment of the bonds to the holders to fulfil her engagements. Her promise circulates, the coupons are drafts of Comptroller on her Treasurer. The Treasury must be supplied in advance to enable the Treasurer to make the payments semi-annually. None other can make the payments. We hear of no demand, nor correspondence of any bondholder with the corporations relative to the payments at any time. This plaintiff, the most adventurous of all, never made demand, claim, nor gave a notice that he had a right. How is it with the State and the corporations? The corporations could preach with effect upon the text that the borrower is servant of the lender. A multitude have been sold out, bag and baggage, superstructure and equipment. The State has employed her lien with potency and vigor, and under extraordinary conditions with practical ability.

These acts of Tennessee might have been drawn with more precision, but the policy and measures show a strong and resolute will and vigorous statesmanship. If the arguments of the plaintiff were well founded, the State would have surrendered her lien whenever her bonds were sold by the companies, for they say the mortgage is in the bond.

The plaintiff tells the Court that bonds of this issue are floating in Europe; if so, the lien floats along with each one. The scattering of liens that affect some thirty different corporations in different parts of the same State, under different boards, could possibly have been of no advantage. If the bondholders had interfered, there might have been confusion and embarrassment, or there might have been dilapidation, peculation or corruption. Unity of administration in these works is absolutely necessary, and no construction, which implies that such rights and powers are to be scattered in every direction, can be indulged as rational.

The twelfth section opposes an invincible argument against such a conclusion.

It is difficult to say at this distance of time, and dearth of testimony, what were the precise influences that dictated the adoption of the measure to establish a system of internal improvements in that State, and what combinations were made; but to any one practiced in American politics, the bare array of fifteen railway corporations, staggering under a load they could not hope to carry with any ease or profit to the members, is a circumstance to be considered. We look with anxiety to find the conservatory elements in the act, and naturally inquire where are the *defensores civitatis*. In this act they are found in the fourth and twelfth sections, and are displayed in the securities taken to compel the payment of the semi-annual interest and the provision for the payment of the debt by the instrument of a sinking fund. The only mastery over such bodies is to be found after all in the people represented by their civil government—Governor, Senate and House of Representatives.

This faculty of masterdom is provided in the act, and in a judicial view the ownership of the property, in the whole and in every part, with the powers of entry for control and management, and correction of abuse, are the most effective instruments. With a strong, vigorous, uncorrupt and resolute race as Tennessee had at the date of these acts, to place in her State government the act, does not seem now to have been greatly misconceived. They had confidence in themselves, and it is questionable whether their confidence did not abate directly as the squares of the distances in respect to the rest of the human family.

XI.

The Illinois Central Railroad Company was the owner of the eleven hundred and sixty-nine bonds which were executed by the Chicago, St. Louis and New Orleans Railroad Company, to raise the sum needful to pay the State of Tennessee, and these bonds are substituted to the rank, and to succeed to the rights and powers the State had to vindicate and enforce the priority of the debt, which she had against the Mississippi Central Railroad Company. What is meant by the words "that when the whole road shall be completed the STATE OF TENNESSEE *was invested with a lien* without a deed from the company upon the entire road" is illustrated by the official conduct of Neely. Record, p. 282. He was appointed receiver by the Governor, 25th of February, 1876, and remained in possession till the *debt* was paid, 28th of November, 1877. He paid the State Treasury $110,000. He had collected, as revenue from the road, $802,241.62. He operated the road as a local road, and run it to make the most of it for Tennessee. There was an effort to pay off the interest by the debtor corporations, but the Governor stated "that he would not give them possession of the road, until the whole debt was paid: the State would receive any of her outstanding bonds in payment."

It will be observed that the four per cent. of sinking fund, due in 1867 and thereafter, was still a charge on the railroad from the State about fifty per cent.

The State, with this lien invested to the exclusion of all other liens existing, or to exist, still was subject to some law. She had made in the acts of 1869 and 1870, offers of the most reasonable character, not simply to her debtors — the railway corporations — but to her creditors—the holders of the bonds of the State.

The offer was made to the creditors of the State, to pay any part or portion of the debt of the corporation to the State, and that they shall have, hold, and be subrogated in all the rights, privileges, and liens of the State to the extent of, and in the proportion to the amount of such indebtedness. Sec. 8, act of 1869.

The same offer was made to all of the corporations in the first and second and fourth sections of that act.

The seventh section of the act made the offer to any individual or corporation to come forward and pay the debt of the State and take the lien of the State. In each of these cases, the corporation must consent. Without such consent, a third person having no interest cannot pay the debt of another and hold it, with subrogation of the accessories.

The debtor corporations were unfettered. All others might intervene to make the payment and acquire the first mortgage on the railroad. This offer was open to the association of bondholders from February, 1869. The testimony shows that there was no great alacrity with any one of them, unless the first two. In the Roman law the creditor was to consent to the subrogation of the securities in his hands, called in that law, substitution or succession.

The system was introduced into France to meet a condition not unlike that with which Tennessee was placed in 1869 and 1870. A very large portion of the securities in France are called *rentes*. In the time of Henry IV, upon the restoration of prosperity and order, the price of the *rentes constituees* had fallen one-fourth. The country was burdened by the excessive charges for money in the time of commotion during the reign of Charles IX.

The debtor could not redeem, for his property was burdened with the charge existing to all of its value.

The creditor would not consent to subrogate his securities.

To enable the debtor to avail himself of this reduction of *rentes*, an edict of the king, promulgated in May, 1609, enabled the debtor to borrow the money, with which to make the redemption, and as security for the specific loan applied to the specific object, to *subrogate* the *lender* to the hypothecations and pledges, which the creditor had held. The application of the loan was a condition without the performance of which the subrogation had no operative effect. The word subrogation came into the vocabulary of the civil law with this edict, having had a meaning similar to substitution and succession in the canon law. The Parlement of Paris in the year 1690, decided, that the rule of this edict should be applied to all cases similar, and was not to be restricted to *rentes constituees*. The code of Napoleon incorporated it as a part of the chapter on payments and was transferred thence to Louisiana. The edict is commended by jurists and by statesmen.

Gauthier, de la Subrogation, secs. 123, 240.
Merlin Rep. to. 32, secs. 2, 4. *Verbo Subrogation.*
33 Dalloz, Jurisp. Gen., pp. 399.
Demolombe, des Ob., to. 4, secs. 391–4.

Tennessee, in 1869, found that her efforts to re-establish her railroad corporations were impracticable. The expenditures she had made for the constitution and equipment had in many instances been wholly unproductive, and the work done and property purchased, had been destroyed. Her lien was in many cases confined to the road-bed.

This lien was prior, paramount, and engrossing. It was a barrier to any improvement of the property. The statutes placed the lien before all parties interested, at its cost, in the bonds of the State of Tennessee, of the kind which had been issued for internal improvements. No one bond or bondholder was excluded under the terms of the act for participation. Nine years and nine months had elapsed from the enactment of the law of 1869, before the

Illinois Central Railroad Company completed the settlement with the State of Tennessee.

The State had acknowledged payment in full of the debt contracted with her, by the Mississippi Central Company, by the acceptance of a loan of her bonds under the acts of 1852 and 1856. So the receipt describes the bonds when received. This was the primary obligation of the Mississippi Company. This was the basis, the support of the lien, which had been vested in the State and to which this lien was accessorial, and as were all of the various remedial processes, rights of entry, demands for deposits to pay interest, and sinking fund. The general meaning of the word payment is liberation; a more restrictive meaning is the delivery of a thing which ought to be given, or the performance of the thing to be done; the real fulfilment of the thing to be done or given, according to the obligation; "*Praestatio ejus quod in obligatione est.*" In the settlement with the State, the Mississippi Central was represented by successors to her rights in the railroad property, not a debtor otherwise. These successors came to disencumber the property, it being in the custody of the State, because of a delinquency in the non-payment of interest under the laws of the State. A person succeeding in the title, has a recognized right to pay off the incumbrance and to relieve the estate from incumbrance. The bargain was concluded between these capable parties, and the State is paid in full according to her demand.

The Mississippi Central Railroad Company was liberated; the claim of the State against *her* is extinct. But the effect of the payment extends to the accessory obligations, the hypothecations, liens, rights of entry. Neely, receiver, retired from the railroad with his staff. No one complained at the time. Mr. Calvin Amory Stevens, some weeks after, having forty-two interest coupons unpaid on bonds originally issued to the Mississippi, amounting to $1,260, we have a strong impression that this Court will not listen to an appeal that does not rest upon a broader pecuniary foundation.

XII.

We are unable to find a standing place for the plaintiff in this Court, or in the Circuit Court. His demand is founded upon forty-two interest warrants, all alike. They are drafts of the comptroller upon the treasurer of Tennessee for the sum of thirty dollars each, for semi-annual interest on bonds from the first of January, 1876, to the first of January, 1879, both inclusive. We have conclusive proof that all of the interest payable on the amount of bonds lent to the Mississippi Central by the State of Tennessee, which had been previously collected, was collected by R. P. Neely, as receiver of the State, appointed by the Governor under the fifth section of the act of 1852. He vacated the railroad 28th November, 1878, having paid $110,000 into the treasury of the State for the full sum due by that company. In respect to none of these coupons is there evidence of presentation according to the tenor of the warrant. During the period from 27th February, 1876, to 28th November, 1878, the whole of the railroad was in the possession of the receiver. The payment to the treasurer was several weeks before the suit was filed. The bonds do not mature until 1892. The question of the application of the interest is one that never did in any manner appertain to the railway corporation.

XIII.

The fundamental principle that agreements can have no effect except between the contracting parties, and that a creditor can demand performance from the debtor and his representatives, and cannot demand nor be required to accept performance from a third person, is set at naught in this bill. The principle that no third person can become entitled by the contract itself to demand performance of any duty under the contract, is equally disregarded.

Pollock on Cont., ch. V., pp. 171–174.

Anson on Cont., pp. 193, 194.

Pothier on Ob., ch. 1, art. V., p. 29.

The principle that a person who is not a party to a simple contract cannot sue on that contract, and consequently that a promise made by one person to another for the benefit of a third person, who is a stranger to the consideration, will not sustain an action on it.

Exchange Bank vs. Rice, 107 Mass., p. 37.
Mellen vs. Whipple, 1 Gray, 317.
Locke vs. Horner, 131 Mass., 393.
Eley vs. Positive Co., 1 Exch. D., 88.

To give a third party, who may derive a benefit from the performance, an action, there must be first an intent by the *promisee* to secure some benefit to a third party, and second, some privity between the promisee and the person to be benefitted, and some obligation or duty arising from the former to the latter, which would give him a legal or equitable claim to the benefit of the promise.

Vrooman vs. Turner, 69 N. Y., 280.

In Garnsey vs. Rogers, 47 N. Y., 233, the Court say: "To entitle the third person to an action the contract must have been for his benefit. In this instance the contract was between the State of Tennessee and the Mississippi Central Railroad Company, and none other; it is without form, and is deducible from regulations, requirements, directions, and commands, over a series of years.

The immediate subject was the loan of ten bonds of the State for every completed mile of railroad within that State, on a line projected by that corporation, and the *State, for the re-imbursement of that loan, was invested with a lien* on all of the property of the corporation in the State. The bonds were in the form of bonds payable to bearer, and were for sale, and were sold. The obligation to re-imburse was created at the time of the reception of the bonds by the company, and the duties of re-imbursement are detailed in the sections of the act of 1852 and other acts, and under a reservation

of right to make all such laws as should be deemed necessary to secure the State from loss and to protect her interest.

It was fully understood, as well by the State as by the company, that no third party was contemplated as having any direct connection with the contract, nor to be concerned with its execution or enforcement, and that all that would accrue to any third person was an incident, and consist merely by the addition it made to the resources of the State to enable her to fulfil her obligations. With this understanding, in 1877, the State and the company had a full and final settlement, and the company was released and discharged.

The plaintiff murmurs and complains as if the arrangements of the defendants had been made to defeat his ventures in six Tennessee lien bonds, with forty-two coupons, at from forty to fifty-two per cent. a bond. That no alienation of contract or of lien was imagined by the authors of the legislation in Tennessee, is apparent from the absolute control which was given to the executive department of all of the various remedial processes and powers to be found in the act in respect to the defaults and delinquencies of the corporations. The possession of the contract and the accessorial estate and the powers attached were necessary to the development, management, and operation of the system.

XIV.

The body of statutes which were enacted in the State of Tennessee were not intended to impart contracts, nor to vest rights in all the cases where directions are given, regulations imposed, or duties to be discharged, though conventional obligations do arise. The State proposed to introduce a system of internal improvements within the State by the grant of aid to a large number of corporations, and by the imposition of regulations, and the direction of measures needful to the organization of the system. The State had a very great control, for all of these works were of a public character, and when completed formed a part of the public domain. Her powers were fortified by the relation she established at the

outset as a creditor, having a paramount and exclusive lien on the property of the corporation. The State invests herself with an estate in every element of property of the company in Tennessee. The State did not intend to create a trust in favor of her own bonds. The State was directly and exclusively liable to the holders of these bonds.

The bonds contained a direct obligation to the holder, whomsoever he might be, and without any care upon the part of the State to ascertain him or to designate him in advance. The lien was reserved to the State to enable the State to exact from the corporation, means for her treasury, and to increase the resources for payment. The State undertook to manage her own financial affairs, and her own relations with her corporations, without the agency or aid of the bondholders. The relation of trustee and *cestui que trust*; of principal and surety, as legal or equitable relations among these parties. The State prohibits the existence of a conflicting lien. *It denies to the corporation to give, create, or convey, to any person or persons, or body corporate whatever, any lien, incumbrance, or mortgage, of any kind, to come in conflict with her lien secured in that act.* She annuls any such lien, incumbrance, mortgage, as against this: *And that the lien and mortgage of the State shall have priority over all claims existing or to exist against said company.* It is the disposition of this lien by the State through LAWS *deemed necessary by the legislation to secure the State from loss,* which is arraigned by this plaintiff. No case has ever come before this Court that presents such a body of argument to require its rejection.

Chamberlain vs. Sioux City, 92 U. S., p. 306.
Wilson vs. Boyce, 2 Otto, 221.
Woodson vs. Murdock, 22 Wall, 351.
Murdock vs. Wilson, 2 Dillon, 188.
Branch vs. Macon Railroad Co., 2 Woods C. C., 388.

The Lord Chancellor Cairns, commenting upon the terms of a will which gave uncontrollable discretion to trustees, said: "The

trustees are not merely to have discretion, but they are to have 'uncontrollable'—that is, uncontrolled discretion—their discretion and authority, always supposing there is no *mala fides* with regard to its exercise, is to be without check or control, from any superior tribunal.

"What is the subject matter with regard to which they are to exercise their discretion and authority? The subject matter is the payment or the application, not merely of the whole income of their real or personal estate, but of such portion as they deem it proper to expend. It is for them to say whether they will apply the whole, or only a part, and if so, what part, and how are they to decide if they do not apply the whole; what is the part they are to apply?

"They are to decide upon this principle that it is such part as shall be sufficient, not such part as shall be demanded by or for the person to be benefitted, but such person as they shall deem expedient; and upon the question of what is expedient, it is their discretion which is to decide, and that discretion according to which they are to decide is to be uncontrolled." This analysis of the terms of the will might be applied to the terms of the 12th section of the act of 1852. The Lord Chancellor, when asked to apply rules, which, sometimes, the chancery employs to direct and control trustees, answers: "MY LORDS, to do so would simply be to reverse the words used by the testator, and to say that the discretion which is given to the trustees by this will, and which is stated *to be uncontrollable, shall be controlled and be subject to that rigid and unbending rule upon which the Court of Chancery acts upon those occasions when it has to perform the functions,* WHICH IN THIS CASE THE TRUSTEES and not the court have to perform."

Gisborne vs. Gisborne, H. D. 2 App. Cor. 300.

Tabor vs. Brooks, 10 Ch. D., 273.

The twelfth section enacts that the State of Tennessee *expressly reserves the right to enact by the Legislature thereof, hereafter,* ALL

such laws as may be deemed necessary to protect the interest of the State, and to *secure the State against any loss in consequence of the issuance of bonds under the provisions of this act*, but so as not to impair the vested rights of the stockholders of the companies.

The reservation is of right to enact ALL laws *deemed necessary* for the exigencies described. The power reserved is the legislative power of the State, to be called into exercise when deemed necessary.

This enactment imports that the system as propounded is provisional, and that additional measures deemed necessary may be engrafted upon it. It implies that under adverse conditions, which might possibly occur, that the power of the State to secure her from loss might be exercised without constraint other than that stated in the last line of the section, in the form of remedial legislation deemed proper. The case which has occurred is the disruption of the entire system of internal improvements established in the acts by the casualties and calamities of war.

We are not aware of any instance of a corporation escaping a wreck. The demands of the State for interest and for a sinking fund were disregarded, the credit of the State was impaired, and her contracts were not fulfilled. To secure the State from loss the act of 1869 was enacted, which proposed a liquidation of the State debt. The object was to call in her bonds by the employment of the lien of the State, by its cession, or sale, or release.

If the fourth section of the act had declared a direct trust to pay the specific bonds to the very holders of the bonds, that case would have been within the terms of the act, with the 12th section therein. No principle of the Constitution of the United States would be affronted by the enactment of the law of 1869, under the conditions of that act. The act of 1869, as we have stated it, allows to the corporations to pay their debts in the bonds of the State; it allows any holder of bonds to invest them in the purchase of an interest in the lien of the State. The aim of the State was to secure the State against any loss in consequence of the issue of bonds under the act.

XV.

The validity of a payment depends upon the fact that it is made to a proper person, to the creditor competent to receive it, or his assignee, or to one charged to receive it, or who may be authorized by law or by judicial authority to receive it. The Chicago, St. Louis and New Orleans Railroad Company was in pursuit of this person sometime before the 28th November, 1877. They were owners of the property subject to the Tennessee lien. Tennessee had possession of the property, and would not surrender without payment of the demand of the State for the debt on account of the loan of the bonds. Where was the owner of this lien? The State had been *invested* with it for the purpose of being paid the amount of the bonds she had issued and loaned to the company. The State had now obtained a corporal investiture of this estate, and had the occupation of the property. But more than this, the statute of 1852 had always designated the State as the party to receive the money, and to deal financially, as creditor of the company. This was done in the delivery of interest fifteen days before the maturity of the coupons; so in respect to payment of the sinking fund; so in the recovery at the maturity of the State bonds. This being the condition, none but the State could call on the corporations for moneys. Regarding these acts as conventional (without the aid of the section), a requirement on the companies to pay otherwise, and elsewhere, and differently, would be a departure. Supposing the fact to be as this bill states, that the corporations are debtors to these holders of State bonds by some sort of the webs and meshes and entanglements which are so creditable to legislative enactment or to judicial administration, what then? Since the acts of the legislature of the State under which the bonds have issued, designate the officers of the State to receive moneys to be paid by the corporations for the interest, for the sinking fund and for the final payment, at least the State is *adjectus solutiones gratia.* Tennessee, at least, is a delegate of the

creditors to act in their behalf, as well as the delegate of the corporations, and all of the administration is, in consequence, unimpeachable.

Regarding the State as holding this position by common consent, there can be no dispute of the validity of the acts of the State in reference to the receipt of payments.

Suppose the case that none but bondholders might receive payments,—the corporations should have had agents at New York to receive their remittances of interest; they should have published their vocation to pay coupons on the series issued to one railroad; they should have published the marks of the bonds to direct the holders to the place of payment. Each sinking fund would have found a different depository; the State, the obligor on the bonds, would have had no function to perform in the matter of this administration—or in paying her own bonds—the *reductio ad absurdum* is sufficiently manifest.

XVI.

The demand of the plaintiff is, that the priority of the lien of the bonds *he presents to the Court*, upon all of the railroad, the equipments thereon, incomes, tolls, rights, privileges, and property of the Mississippi Railroad Company be declared and be enforced by seizure of the property. The bonds he presents mature in 1892, so the demand is reduced to the forty-two coupons which were due and not paid to him by the State. The State had collected her demand of interest, so that a single coupon on each bond is alone the matter of discussion.

The bill reposes alone upon the words in the third section of the act, which enacts that so soon as the bonds of the State shall have been issued for the first section of the road they shall constitute a lien upon said section, &c. To support the argument of the bill a South Carolina case is produced, wherein a similar act was construed by the Supreme Court in that State; Hand vs. Railroad Co., 12 S. C. Rep., 314. That case is one where the debtor com-

pany, the owner of the railroad, issues the bonds for the specific amount allowed, and the State, under the provisions of the act endorsed on the bonds, certifying the act had been complied with by the company, and that the full and complete payment of the bond is guaranteed, and the faith and funds of the said State are pledged to secure the payment of the principal and the instalments of interest becoming due. The point of discussion was whether this constitution of a lien and its investment in the State for the payment of the bonds so endorsed, enured to the holder of the bonds. The members of the Supreme Court of South Carolina were divided upon the importance of the term "constitute a lien," and Judge Heiskell makes some pertinent observations upon it. It is one of the traditions of the Supreme Court here, that Maryland and Virginia disputed which State produced the better quality of hams, and submitted to the Judges of the Court specimens from each State of the same number; the members of the Court then formed a mess.

The Chief Justice, at the end of the term, announced that the Court decided but one question: That the Maryland specimens weighed the most, and reserved all other questions, with permission to either party to furnish further proofs. The opinions of the Chief Justice and the concurring Judge in South Carolina with a report of the Master in South Carolina, on the whole, are more ponderous than that of Judge Heiskell, and this is all that need be said about them.

The case in this Court is one where the railroad company is not a party to the bond as principal, endorsor, or guarantor, and has not made a contract with any but the State; that is, a contract of the borrower of bonds, and to perform every duty and obligation arising out of that relation, as the State shall declare by her laws is incumbent upon her to secure the State from loss.

A portion of the duties of the company are defined in the act, and the character of the intimate and exclusive relation between the State and the company becomes apparent, while the separation between the corporations is in the same manner conspicuous. For

the validity of a convention even unilateral, the consent of the party to be bound by it, as well as the consent of the party to whom the fulfilment must be made, must be shown. So long as there is no reciprocity nor mutuality, there cannot be a convention. Since every convention implies the concurrence of two or more minds upon the same proposal, we must look to the proposition or offer and the acceptance, to ascertain whether there be such concurrence.

Have the minds of these numerous persons met at any time at the same rendezvous? The identity of the offer in this case does not consist merely in the fact that the State shall grant aid, and the corporation accept the grant, but running through the various acts there are clauses and conditions, there are persons to whom they are addressed, and persons who must receive them. It is necessary if that a convention so composed be made, there shall be concurrence. In the offer of the State of Tennessee, the well defined object is the organization of a system of internal improvements in that State, to be effected by the co-operation of railroad corporations to build their respective roads, in so far as that an advance of ten State bonds for each mile shall be adequate to the entire fulfilment of the project. The State consents with the corporations, on their accomplishment of a described portion, to advance the bonds to the company, and is invested with a lien according to the fourth section of the act, for the payment of the bonds delivered to the company; the bonds are thus delivered to the corporations as their property.

At this stage we find a separate contract—the State acting for herself, and the corporation binding itself, by the acceptance of the bonds of the State, to all of the distinct conventions which are implied in a contract of loan, as existing in the common law, and as modified in the statute of 1852, or other statutes which may be framed under the 12th section of the act.

The conditions established at the date of the delivery of the bonds can continue without other relations, other contact, without

confusion, without reference to, or approximation with, the statutes of Tennessee, of any new person or party.

The bonds of the State are separate, distinct and sufficient—calling for no support, assistance, or connection with any other individual. They differ from the bonds of individuals, as reposing upon the faith pledged by the State on their face. No demand, protest or notice are needed. No action of covenant or debt can be made to have a judgment or execution. The obligation is not juridical, but settlement is sought for from comptroller and treasurer.

The State is the only promissor, and payments must be sought at the treasury, or from agents of the treasury. The purchase of the bonds delivered to the corporations in the market, does not connect the purchaser with any one beside the promissor of the bond and the conditions expressed on the face of the bond.

XVII.

The relations established in these statutes are all legal relations. They are imposed by law, essentially revocable in their nature, and to be altered or modified as an occasion may require. That a person may acquire rights or be subject to obligations as the effect of a contract, the least that should be asked for is there should be a consent or purpose manifested. Conventions have effect only between the contracting parties and upon a sound principle; they do not injure or profit any third person.

The parties to these improvement statutes are the State of Tennessee, dealing with the subject matter as a legislature imposing rules of action, and the corporations are subjects owing obedience to those laws by fulfilling in advance conditions precedent. The duty imposed by the law is direct and is the precise consequence of an assent to the law as made. There is no *equitable estate*, right, title, interest or property *invested in the State*, or other person separate from the legal estate. There is no use for a Court of Chancery to decide upon matters of conscience. The State has set

down in the statute what she will enact as laws under some circumstances, and what provision she will make in the future in respect to the corporation.

Story's Eq., Sec. 964; 2 Atk., 612.

The State holds no position as trustee; she has no *cestui que trustents.* The corporation has accepted a loan of 1,199 of her bonds, sealed with her seal, and suitable for sale. She invests herself with a supreme lien, a legal estate, and right which she will hold until she is liberated from the obligation contracted by her in the issuing of those bonds and their delivery to this corporation. There is no debt nor duty imposed upon any person but the corporation; the State comes under no obligation to any other by the investiture which has taken place. The precise purpose of the fourth section of the act of 1852 was to settle the relations between these parties. Nothing was before them but the immediate relation to be established at the delivery of the bonds and at the time the work had been completed by the railroad company. It will appear from these facts, from a consideration of the different sections in the statutes, and the usage under the statutes, and the character of the laws subsequently made, that the State of Tennessee had no thought of offering further assurance to the purchasers of her bonds; or of placing them in any connection or contract with the railway companies, or of transmitting to them an interest in the railway property. Her purpose was to obtain an estate adequate to enable the legislature to legislate with vigor when it might be necessary for the public good. The relation of trustee and *cestui que trust* does not exist. In the Louisiana cases in this Court there was a similar attempt to evade the relations determined by constitution and laws, by doubtful interpretations and oppositions of science so called.

In those cases there were facts that taxes had been pledged in express words; some had been collected and were apart from other moneys; some were in process of collection; there was a corporation which might assess, collect and distribute the taxes

for the future. We have nothing to do, it was said, but to write the decree. But a sober-minded, sincere, magnanimous obedience to the constitution as the supreme law does not admit any indulgence of the oppositions of science, falsely so called. The decree could not be written; the only debtor the plaintiffs have is the State of Tennessee. The only contract the plaintiffs made was to acquire as their property her bonds. The defendants are not debtors.

XVIII.

The obligation of that State in this Court is an imperfect obligation, for the reason that the constitution prohibits a suit to enforce it. The lien of the State of Tennessee is a real right, an estate, an authority obtained by her own declaration, without a deed from the corporation, and invested in her. It is possessory, for the State may take possession under her estate and because of her laws. The same objection arises in reference to seizure of the property as existed in the Louisiana suits. Pollock in his chapter upon imperfect obligations makes a summary of the law.

An imperfect obligation is an existing obligation which is not directly enforceable. This state of things results from exceptional rules of positive law, and especially from laws limiting the right to enforce contracts by special conditions precedent or subsequent. When an agreement of imperfect obligation is executory, a right of possession, founded on the obligation, can be no more enforced than the obligation itself.

Pollock on Cont., p. 600, Am. ed.

This right of possession to the property of the Mississippi Central Railroad Company was invested in the State of Tennessee by the lien she retained, and the executory process she reserved in her statutes commencing in 1852, and which are implied in the statutes regulating the sales for default for two years in the payment of interest and default in the payment of the sinking fund.

No transfer of this lien was made by the State, and there is no means by which the plaintiff can withdraw it by judiciary action. The State is not the subject of the judicial power.

Louisiana vs. Jumel.
Elliott vs. Wiltz, 107 U. S., 711.
Troy vs. Commonwealth, 127 Mass., 43.
Connecticut vs. Shelton, 47 Conn., 400.
Sloman vs. Governor, 1 C. P. D., 562.
Parlement Belge, 5 Prob. D., 605.
State vs. Burke, 33 Ann., 498.

XIX.

The jurisdiction of this Court in these cases is invoked upon some impression that there exists some *equity* which binds the conscience of the State of Tennessee, and that the Court can be called upon to direct and guide that conscience to the adoption of their prayer to substitute the holders of these bonds to the rights and faculties of the State in her various acts of legislation. The constitution of the United States has opposed a barrier to all enterprises of good and benevolent Courts or judges to amplify jurisdiction. The disclaimer is of the existence of judicial power in the United States, and a direction that it shall not be employed. In Casbird v. Attorney General, the Ch. Baron Richards says "very considerable difficulty has occurred in the consideration of cases between the subject and the crown, from a doctrine which is well founded to a certain extent, *that there are no equities against the crown.* I felt early in this cause the embarrassment which arose from the doctrine that the crown cannot be *considered* a trustee. I say generally, for I do not mean to say that it is so universally, and I do not know if the crown had the legal estate, how I could have got it out of the crown's hands for the benefit of the *cestui que trust.*"

6 Price Ex. R. 411, 480.

When the crown is a trustee, the Court of Chancery has no jurisdiction to decree a conveyance, but the party must resort to a petition of right; and the court can decree no foreclosure against the crown, nor sale of a legal title when the title is in the crown.

3 Y. & C. Ex. 342. 2 Vesey Sr. 446.

Troy vs. Commonwealth, 127 Mass., 43.

1 Perry on Trusts, pp. 40, 41.

XX.

The State of Tennessee in undertaking to establish a system of internal improvements, by granting to corporations, loans of the bonds of the State bearing interest, and becoming payable at a remote period of time, thus to secure the State, became invested with a lien or mortgage upon the entire property of all of the corporations for the repayment to her of the sums lent. The bonds were sold by the corporations, and not by the State and were payable to no ascertained person, "to bearer." The State did not assign the lien; nor did the corporation guarantee the payment of the bond. The corporations were all domestic, their property within the State, and for every duty exacted of them, performance was required to be made for the State and within the State.

The question is whether upon a failure of the State to pay the interest on the bonds, this Court can decree the payment of this debt, due to the holders of the bonds, should be made by the defendant railroad company, as the borrower of bonds?

Lord Chancellor Selbourne has said in a late case, "It is equally important to maintain the doctrine of trusts which is established in a Court of Chancery, and not to strain it by unreasonable construction beyond its proper limit. There would be no better mode of undermining it than to make unreasonable and inequitable applications of it."

Barnes vs. Addy, 9 Ch. App., 281.

Wilson vs. Bury, 5 G. B. D., 518.

Another Master of Equity has said: "There is one good, general and infallible rule as never deceives. A general rule to which there is no exception: and the rule is that the law never implies, and the Court never presumes a trust, but in a case of absolute necessity."

Cook vs. Fontaine, 3 Swanst., 533.

Citizens Bank vs. National Bank, L. R., 6 H. L., 352.

The Court is invited to give, create, convey, imply, or presume a trust in favor of these plaintiffs. The Court may find it, if it pleases, in the bonds, although the bonds are entirely free from any allusion to one, or any declaration of one. The bonds are not the bonds of the defendant railroad company. The bonds are the bonds of the State, and the State has invested herself with a lien to secure from the railroad company the fulfilment of her obligations to the State; the ultimate result to be the performance by the corporation to the State, of all of her obligations and duties as a borrower of bonds, so that the State should not suffer loss or even inconvenience. Savigny, speaking of this class of issues—bonds of a State—"They are true *quantities;* things which have no individual value. One obligation of a State has absolutely the same value as another of the same kind and amount. They may be placed absolutely in the same rank as money in this point of view, which are distinguishable, however, in their destination. Their end consists in bringing together large sums of money, as they afford to investors an easy and convenient mode of placing their money at interest."

2 Savigny des Ob., sec. 64, p. 268–9.

The obligation of a borrower of bonds is to make payment of his loan in any of these quantities. This obligation may be discharged at the pleasure of the borrower and lender. The lender can never be damaged by a return of the bonds. The State, after

the railroad was completed, would have been relieved by such a return. The construction which the plaintiff contends for would obstruct the policy of the State to liberate herself from debt and to withdraw her bonds from the market.

The aim of the State of Tennessee was to redeem all of the bonds of the State before their maturity. The provision for a sinking fund in the first act of 1852, and the more definite expression in the act of 1856, still more strongly expressed in 1860 and in other acts after the war, leave no doubt of her policy. The preservation of her lien until this was acomplished is found in all of her acts, so that none of these intimate that the holders of her bonds should have any legal right or any authority to enforce that lien. The lien was for the State, through which all of her measures should be validated and made effectual. The exclusiveness of the lien and of the power of the Legislature to enact laws necessary, were the reliance of the State. The terms of the act remind us of the prerogative rights and remedies which are described in the ancient statutes of England, and are commented on in the digests of her laws. The King shall be preferred before any other creditor. By the common law, the King's debtor had protection, so that he should not be sued by other creditors until the debt of the King should be paid. Every person who is anywise chargeable to the King is a debtor to the King, whether it be for debt, duty, damage, or rent in arrear, or other thing, for it shall be taken extensive.

Comyn's Digest, tit. Dett., G., 1, 8.

Giles vs. Grovey, 6 Bligh, N. S., 398–399.

The twelfth section of the act of 1852 is so comprehensive in its terms, and has been so consistently applied in the administration of the State without contention or dispute, that were there more of discrepancy in the statutes than there appears to be, there can be no ground for the impeachment of the settlement by the

defendant railroad company with the State in 1878. The State at that date received her principal and her interest, in full, in her own bonds, upon her own proposition that payment should be so made.

She was liberated from all the debt she had contracted for the account of the defendants.

JOHN A. CAMPBELL,
For Appellee.

XXI.

Has this Court Jurisdiction of this Appeal?

The plaintiff alleges in his bill that he owns six bonds of the State of Tennessee, dated first of January, 1856, and which became payable the first of January, 1892. Record, p. 17. The bonds are Nos. 3623, 3734, 3826, 3879, 4745, 5511. Record, p. 592. According to the statement in the bill there were coupons unpaid from January, 1876, till January, 1879, both inclusive, making forty-two coupons, amounting to $1,260. These bonds were produced by the plaintiff, and one of the number had more of coupons than are mentioned in the bill, and one fewer. At the date of the decree, on the 7th October, 1881, the coupons on these bonds amount to $2,730.

The plaintiff produced at the time of his examination four other bonds that he did not mention in his bill—Nos. 3748, 4630, 4652, 4840. All of the coupons on the ten bonds do not amount to the sum of five thousand dollars, but about $4,550. The bonds are not the bonds of any defendant in this cause, but of the State of Tennessee, and the claim upon the defendants is not a claim for money due by those companies to the State or other person; they are successors in estate. Now the proof is conclusive that on 28th November, 1879, Receiver Neely had paid all of the interest

in arrear on the loan of the State to the Mississippi Central into the State treasury, from collections he had made under the fifth section of the act of 1852.

The State had been fully indemnified at that date.

There was no pretence for any claim for interest as due from the Mississippi Central. Neely's dep., p. 282. Porter's dep., p. 313. The plaintiff, on the case stated in the bill, does not show a debt for five thousand dollars, as due at the date of the decree in October, 1881, in the Circuit Court. Nor does he show jurisdiction upon the evidence submitted of the State, of the account between the State and the Mississippi Railroad Company.

XXII.

The State of Tennessee, the debtor of the plaintiff, is not a party to the suit. And in the absence of the debtor, the plaintiff proceeds against the defendants, as debtors of the State, for interest in arrear. Without proof of a debt, there can be no successful suit on a mortgage.

The decree must declare a debt.

We submit that the plaintiff does not show a case within the jurisdiction of this Court on appeal.

JOHN A. CAMPBELL,
For Defendant.

FILED
OCT 15 1884
JAMES H. McKENNEY
CLERK

114-663

Supreme Court of the U. S.

October Term, 1884.

No. 663

CALVIN A. STEVENS,

vs.

CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD COMPANY,
ILLINOIS CENTRAL RAILROAD COMPANY.

APPEAL FROM WESTERN DISTRICT OF TENNESSEE.

JOHN A. CAMPBELL,

For Appellee.

Pope Brothers & Co., Printers, Washington.

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For Defendant.

SUPREME COURT U. S.
FILED
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114-663

Supreme Court of the U. S.

October Term, 1884.

No. ~~480.~~ 163

CALVIN A. STEVENS,

vs.

CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD COMPANY,
ILLINOIS CENTRAL RAILROAD COMPANY.

APPEAL FROM WESTERN DISTRICT OF TENNESSEE.

JOHN A. CAMPBELL,
For Appellee.

JOHN MURPHY & CO., PRINTERS, BALTIMORE.

Supreme Court of the United States.

October Term, 1884.

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CALVIN A. STEVENS,

vs.

CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD COMPANY,
ILLINOIS CENTRAL RAILROAD COMPANY.

APPEAL FROM WESTERN DISTRICT OF TENNESSEE.

STATEMENT OF THE CASE.

The Chicago, St. Louis and New Orleans Railroad Company, before November, 1877, had become the owner of the railroad from New Orleans to Cairo by purchases made at sales ordered by Courts of the United States in Louisiana, Mississippi, Tennessee and Kentucky, in suits commenced by the mortgagees and creditors against the railroad corporations who were in possession as owners of the property, and were mortgagors and defaulting debtors. The answer furnishes information of the manner of the formation of this company, but no question arises on this subject. Before the pendency of the suit against the Mississippi Railroad

Company, and others, the State of Tennessee had occupied the section of railroad from the line of Mississippi to the line of Kentucky, across Tennessee, as a debtor of that State for 1,199 bonds issued to the company or companies under the conditions of the internal improvement acts, and for a sum of interest which had not been paid before that date. A receiver had been appointed by the Governor, and this receiver was the manager of the corporation on the 28th November, 1877, under that authority. Ans., folios 43–45. Pursuant to the statute passed the 25th February, 1869, and on the 28th November, aforesaid, three trustees presented to the treasurer of that State the written consent of the defendants that these trustees should settle the debt of the railroad corporations with the State, under the sixth section of the act aforesaid. The Governor certified that the three trustees had delivered the requisite number of State bonds of the proper character, (1,199) in liquidation of the debt of those corporations, and they had been accepted. That these trustees had presented a series of eleven hundred and ninety-nine bonds of the corporation, secured by a mortgage of the company on the same property which had been covered by the lien of the State, and that this lien was then assigned and transferred to those trustees to secure those bonds thus presented, under the authority of that act. Ans., Exhibit 4. The bonds thus secured are of the same quantity and quality of those surrendered.

II.

The plaintiff alleges he is the owner of bonds which had been issued to the Mississippi Central by the State. All of the bonds issued by Tennessee are similar. They were all printed on the same plate, I find stated as a fact in one of the briefs. They are each for $1,000. The semi-annual interest is the same, and is payable on the same days of each year; and they mature on the first of January, and are dated on the first of January. The coupons are all alike, and the State is the only promissor. There is no

payee named on any. The faith of the State is pledged in all bonds, in the same terms for the payment by the State.

The bonds are numbered and letters are used to designate a series. No endorsement, guaranty, pledge, or promise, is shown by any holder from the corporation receiving them. Nor has the State taken from any railway corporation, more than an acknowledgment that the company had received bonds of the description contained in the receipt at the date of the delivery. There is no testimony to show of the payment of the interest to any holder of bonds by the company, on his demand, or claim to have payment from the company. The State collected the interest and in this case there is an instance of a collection by the receiver appointed by the Governor, who paid the sum into the Treasury of the State. He collected interest due on 1,199 bonds, but at that date 261 bonds, of the series issued to the defendants had been paid into the State Treasury and had been cancelled. This surrender of these bonds was made by other persons and not by the company which had borrowed them.

The obligation of the contract of the borrower remained in full force. The contract implied a duty to return the same bonds, or bonds of a like character and description, or if these cannot be obtained then their value.

III.

The plaintiff prosecutes this class of suits upon an interpretation placed on the third and fourth sections of the act passed by Tennessee, "To establish a system of internal improvements in the State," approved 11th February, 1852, which in his opinion sanctions a law suit. The system of the State comprised some fifteen corporations designated in the act of 1852. An act of 1854 admits ten other corporations, among them, the Mississippi Central Railroad Company. Upon the submission of proper proofs, bonds for $8,000 per mile might be issued for sections of thirty miles which were suitably prepared. This allowance was increased to $10,000 by

an act passed in February, 1854. The first nine sections of the act of 1852 apply to one corporation, and all of the legislation is single and applied to that one corporation. The 10th section puts twelve other corporations upon the same footing, and the slovenly sections of 15, 18, 19, introduce others. The conditions of the act are that each corporation should be able, with valid subscriptions for stock, to complete the entire railroad, except the superstructure and equipments. Aid was given to the companies by the State, upon proof of this sufficiency to the Governor, that the company had fulfilled the conditions, as stated in the first and second sections of the act. These were of ability to prepare the road projected, and the actual preparation of the first section of the road for thirty miles.

The bonds issued upon the first section, and the bonds issued upon the preparation of succeeding sections, till the last, impose sectional liens on the sections.

Upon the completion of the railroad, the State of *Tennessee shall be invested* with a lien, without a deed from the company, upon the entire road, including the stock, right of way, superstructure and equipments, and on the property owned by the company or incident for and necessary for its business, *for the payment of all of said bonds issued to the company, as provided in this act, and for the interest accruing on said bonds.*" The section proceeds to declare that after the first issue of bonds to the company "it *shall not be lawful for said company to give, create or convey to any person or persons, or body corporate, whatever*, any lien, incumbrance, mortgage of any kind, which shall have priority over, or come in conflict with, the lien of the *State herein secured*; and any such lien, incumbrance, or mortgage shall be null and void as against *said lien of the State*, and the said lien or mortgage *of the State*, shall have priority over all other claims existing or to exist against said company."

The *tenth* section of the act altered the character of the entire act as it was before that section came in, by the introduction of

twelve corporations besides, and we find here the first development of the *system* for internal improvements in the State. The *twelfth* section testifies, that the General Assembly realized that what had gone before would not serve for the purpose of security nor regulation and that conservatory measures must be adopted. This section is: "*Be it enacted* That the *State of Tennessee expressly reserves the* RIGHT to enact by the Legislature thereof, hereafter, all such LAWS as may be deemed necessary *to protect the interest of the State* and to secure the State against *any loss*, in consequence of the issuance of bonds under the provisions of this act. But in such manner as not to impair the vested rights of the stockholders of the company."

These sections relate to the original negotiations between the State of Tennessee and the railway corporations, and their intercourse during the period commencing when the corporation received the first loan of the bonds of the State, and ending with the completion of the railroad and the delivery of the last instalment. They invite an inquiry of some importance in the solution of the questions in issue in this suit, as to the signification and the result of the negotiations and intercourse. What relations were established?

IV.

Conventional Arrangement of State with Company.

We find that the State of Tennessee habitually regarded the railway corporations as a borrower of her bonds. In the records of the administrative department of the State, the bonds issued to the corporations are denominated loaned bonds of the State of Tennessee, bonds loaned to railroads, liabilities of the State for loans to railroads. The railroad corporations are charged for the amount of bonds loaned.

In the code of Tennessee and the statutes, the expressions relative to the companies are indebtment for bonds issued to the companies, or bonds loaned to the companies by the State. The State claims an indebtedness as arising from such loans or issues.

In the act of 1859–60, ch. 93, s. 9, the comptroller of the State is directed to keep a regular account *against* each company, or corporation, charging them with the amount of bonds originally issued to said company by the State, and crediting them with the amount of sinking fund paid, and shall furnish the treasurer of the State a statement of the amount due by each company on the first day of June and December of each year, that he *may know how much interest each company has to pay.* The seventh section of the same act provides that the sinking fund, when paid in all cases, shall be passed directly to the *credit* of said *company* or corporation, and be a RELEASE to the said *company* or corporation from that *amount due by them to the State.* The commissioners shall issue a receipt to each company or corporation for such PAYMENT, retaining a duplicate in a well bound book kept for that purpose." The manner of the *payment* is stated in the fifth section of this act to be "*in cash*, or in the *like character of bonds*, that may have been issued or endorsed by *the State* for said company at their face or par value." The word *payment* in this act is significant when we consider the nature of the contract between the State and the corporations. It cannot be said that a *loan of bonds* is the same as a *loan of money.* Money has for its destination a rapid circulation as a measure of values, and a ready convertibility into coin. The State of Tennessee expresses consciousness of this in prohibiting *a sale at less* than a *par value*, and in a reservation of a faculty of oversight of the *sale*, to prevent any jobbery.

These bonds are so far merchandise, as that they are vendible; they may be sold privately or at a stock exchange. But it cannot be supposed they were to be merchandise created to be a subject of speculation. They were issued to serve as an investment, and to be purchased and held by persons who have money for that purpose, and in course of time to be returned and destroyed by the obligor. This contract of loan is one known to the law, and is described as a contract where a certain quantity of things of any

kind are delivered by one to another, with the transfer of the right of property, under the obligation to restore the same quantity of things of the same kind and quantity, but *not the identical things.* The borrower acquits himself when he restores the things lent in the same *quantity* and quality at the time appointed.

When contracts of this kind were common, the things which were subject to this contract were those *quae pondere, numero, et mensura constant.* Savigny says of the issues of a State payable to bearer, that they are in fact *true quantities;* that is, things which have no individual value; (*i. e.*) peculiar value as an individual thing. As for example, one obligation of a State has absolutely the same value as another of the same kind and the same quantity. In this point of view these securities are exactly like money, except we must keep in mind the difference in destination. Only it is more difficult to recognize differences in coin. Commonly each separate paper bears an individual mark, by means of numbers and letters; but we, therefore, place them in the same rank as paper money, where such marks are to be found.

2 Savigny des Ob., s. 64.

When the State of Tennessee then defined her principle for recalling her bonds from the market, and provided for the cancellation of the bonds, there is no ground for blaming her for the adoption. The legislation was fully in the spirit of the contract between the State and the corporation. The one interest and policy of the State was to have the bonds cancelled; and whether the cancellation was of one bond, one series, or of another, was a matter of indifference to the *State of Tennessee.* Her obligation in all was the same.

V.

The Convention of the State with the Railroad Companies.

The arrangements of the State of Tennessee became complicated by the fact that upon each of her bonds there are semi-annual

payments to be made every year for a period of thirty or forty years. For these payments the act of the Legislature depended upon the respective corporations to furnish the money needful, and to pay the expenses incident to making this payment—whether commission or exchange. An account was kept with the corporations, showing the debt. The comptroller, a month before the interest was payable, stated the account of each company to the treasurer, and the treasurer made the requisition on the company for the sum necessary. It appears that the bank or the treasurer might deal with a corporation, and if the corporation had coupons in hand due at any day, the corporation could deposit them, or arrange with the treasurer. The management of this portion of the arrangement is similar to the arrangement between the person accommodated and an accommodation acceptor of a bill of exchange.

The person accommodated should place the acceptor in funds to meet the bill. The bonds issued were executed by the State. The coupons were warrants by comptroller on the treasurer of the State. Payments were to be made at a distant city. The payments embraced interest upon all of the issues of bonds which had been made by the State for railroads or other cause. These were all paid to the holders of the bonds in New York by the treasurer of the State, or his delegate, the Merchants' Bank. The argument of the plaintiff is that the lien of the State, as described in the fourth section of the act, was for *the payment of all said bonds issued to the company*, as *provided in the act, and for the interest accruing on said bonds;* that the *payment* intended by the act was a payment to the holder of the State bond, and that no other payment will extinguish his claim on the company and its property, however faithfully paid by the company to the State.

But we find that the State, in the fifth section, effectually *prescribes as law* to the corporations in what manner and to what person payment of the interest is to be made. The payment was to be made into the treasury, so that the treasurer might pay the coupon, on its presentation, in New York. In case that this sum

was not paid as required, the Governor was directed to appoint a receiver to take possession of the property, and to manage it, until the sum needed was collected. The corporation was charged to pay the expenses of this management. In 1876–7 the conditions of the mortgages made by the Mississippi Central Railroad Company had been broken, and suits for foreclosure had been commenced in the Circuit Courts of the United States. Those Courts had appointed receivers, but there was a paramount title, and those receivers had to submit to the State's superior right. We heard nothing then of the lien of the holders of Tennessee State bonds, nor that the lien had been divided and scattered in every direction. The submission was made to a lien that was prior—that no other lien was to conflict with it; that all others were null and void in face of this one.

The receiver held the railroad and paid into the treasury of the State all of the interest which had not been collected before.

The State had treated this corporation as a borrower of 1,199 of her own bonds, and had made a law that the corporation must pay her the interest on the amount of the bonds borrowed from her.

The corporation was not a debtor on those bonds, and the draft in the coupon was not obligatory on the corporation nor demandable by the holder. If the proper construction be that the corporation shall provide the money needful to the State—to supply the State on the contract of loan, and according to the act, the same conclusion must be adopted in respect to the bonds themselves. The State is invested with a lien by her sovereign declaration, without a deed, and this lien is invested for the payment of bonds she had lent to the company. The lien was invested simultaneously with the delivery of the bonds to the company, before their negotiation or sale. No other parties to the convention existed at the time. This lien is to remain prior and paramount for the payment of the bonds. The bonds were not the bonds of the corporation, but of the State herself. The promise of the State in the bond is that of the State alone; her faith is pledged

to the holder, irrevocably, to make the payment according to the tenor of the bond. The obligation of the company as a borrower of the bonds, is to return a like number of bonds, of the same quality and sum, or to pay the amount in money to the State when the time appointed shall come. The act makes no provision for intercourse with the holders of the State bonds, by the corporation, nor when and where they shall meet—on the other hand, the State directs all of the obligations and duties of the corporations, and has provided measures to redress every default.

VI.

We are fortunate in having in this case facts which illustrate so clearly the practical administration of the acts of Tennessee. The Chicago, St. Louis and New Orleans Railroad Company is the product of chancery suits for foreclosure of mortgages, of processes of reorganization, consolidation after expensive receiverships.

When the creditor for millions of the bonds had gone through this ordeal and had come to obtain possession, he finds Tennessee in possession of the railroad within Tennessee to collect interest unpaid on 1,199 bonds loaned many years before to the Mississippi Central Railroad Company, to aid in the construction of the road. The testimony shows that all of this interest was thus collected.

The interest was collected on the amount of the loan, $1,196,000. These plaintiffs say that the State should have collected coupon after coupon of the original issue, and any other collection is nugatory. But it appears that of the issue to this corporation, several hundred had been withdrawn by payments made by other corporations, and that such bonds had been cancelled. This payment did not enure to the benefit of the debtor corporation, nor to its successor. The debt was for a loan of a certain number of bonds. This debt might be paid in these bonds, or in like bonds, or in money, and until payment is thus made the debt remains, and Tennessee was fully authorized to collect the interest upon the amount of the bonds loaned.

The act of 1852 made a provision for a sinking fund.

The object of a sinking fund is to re-imburse the capital of the debt. In the bonds of Tennessee there is no obligation to pay the bonds before their maturity. It is a measure of prudence to make provision. The State does not reserve an authority to call in the bonds.

The mode of employing this sinking fund must be by a purchase of bonds. In the seventh section of the act of 1852 the State provides that five years after the completion of the railroad, one per cent. per annum on the amount of the bonds shall be paid into the State treasury by the company, in the form of bonds of the State, and as between the State and the company the bonds so paid shall be a credit on the bonds issued to the company. The State provides in this section for the compulsory execution of this section, as in a case of default in the payment of interest. In February, 1856, the companies receiving bonds were required to pay two per cent. annually on all the bonds to the treasurer of the State as a sinking fund, five years after the date of the bond. The Governor, Comptroller, and President of the Bank of Tennessee were to control and manage this fund. Laws of Tenn., ch. 120, p. 144, 1855–6. In the acts of 1859–60, ch. 93, there is a special act for the equalization and investment of the sinking fund. This act directs that the money or bonds paid into the treasury by any corporation shall be passed directly to the credit of the corporations paying the same, and be a release to corporations for that amount on the debt due by them to the State of Tennessee.

The sinking fund was increased to two and one half per cent., payable on the first day of April and November, five years after the date of the bonds. The seventh section renews the command that the payment be passed to the credit of the company, and be a release from that amount due by them to the State. The ninth section directs that the company shall be charged with the amount of the bonds, and credited with the payments to the treasury as sinking fund.

There is nothing ambiguous in these enactments. The State plainly manifests that she understood the relation of the State and the company to be that of a lender and a borrower of bonds. The borrower was to return money or bonds to the State both for the interest and for the principal.

The act of 1852 contains another section which illustrates the same condition of policy and purpose. The sixth section of the act states the case of bonds being due and not paid—"*if said company shall fail or refuse any of said bonds when they fall due.*"

The obligation of the company to pay is here declared, the question is to whom payment is to be made; who is gravelled by the failure? It is the State of Tennessee. The Governor must notify the Attorney-General to file a bill in the name of the State in the Courts of Tennessee. The Court was to make all such orders and decrees *in said cause* as the Court deems necessary to receive the payment of said bonds, with the interest thereon, by the appointment of receivers and ordering a sale of the road, property, and assets, as the Court deems best for the interest of the State.

It will be seen from this analysis of the acts, that *payment* in all cases signifies payment to the State. That payment in no case signifies a payment by the corporation, of the bonds of the State, to any holder of such bonds.

The corporation and the holder of the bonds of the State are strangers; the State has in every case interposed herself to keep them apart. In every possible case, the State of Tennessee has maintained control, direction and management of all of her business relations with the corporations, to the entire exclusion of the owners of the bonds, which the State had issued. A case in the Court of Cassation, decided in 1850, is analogous to this, and serves to illustrate it. A lent to B one hundred of the issues (actions) of the Northern Railroad Company, with authority to sell them, and with obligation to restore them in 18 days. The borrower failed to restore them at the time, and after much delay suit

was brought by the lender. The borrower offered to restore them then, but the issues had depreciated, and the lender would not receive them.

The Court of first instance adjudged that the tender should be accepted, and that the borrower should pay as *damages* the difference in value between the date of default, and the tender in Court. The Court of Cassation said the borrower should have restored actions of the same *quality.* What is the quality of the industrial actions? The actions have no other quality than that of current value on the day when restitution should have been made. The borrower, not being able to render those of the same value, he ought to pay in money the value they had when restitution should have been made.

Dalloz, 3 June, 1850, 1, 201.

Laurent, commenting on this judgment, denies that the quality of an action is the same as kind. The borrower owed the issues of the Northern Railroad. He should have paid by returning those issues. Whether the actions rise or fall, their identity remains, and restitution should be made of the same nature.

26 Laurent, droit Civ., s. 508.

In the system of practice in this country, the suit would, probably, have been brought for damages, and the recovery would have been the value when restitution should have been made. The law of the contract was, that restitution might be made in kind, and this is the rule adopted in the act of 1860, which defines the mode of payment of the sinking fund to the Commissioners, Governor, Comptroller and President of the Bank in Tennessee.

VII.

The sixth section of the act of 1869, providing for the liquidation of the State debt, contracted in aid of the railroad companies, under which the settlement was made between the State of Tennessee and these defendants, was made in 1877, proposes a nova-

tion of the debt. The section exacts (1) the consent of the board of directors of the debtor corporation to the payment of the indebtedness of such railroad corporation by any person or corporation; (2), that this person or corporation shall pay such indebtedness in the bonds of the State; (3), the State will substitute the person or corporation to all the liens of the State, against the company, for the payment of the debt of the State had, or has by law, and the Governor and Secretary of State shall give such party a certificate, which shall be evidence for him.

There was no interest in arrears, as in the case of the Mobile and Ohio Railroad Company, and which was settled under the second section of the act of 1870. In a novation of an old debt for a new, the old debt is extinguished by the new one contracted in its stead. The State of Tennessee received 1,199 bonds of the same species, quality and obligation, for those she had loaned to the predecessors of the defendants, who borrowed them from the State. The State was satisfied—paid.

The trustees who paid the bonds to the State and received the substitution to her liens and demands against the debtors, these debtors have a new creditor—the Illinois Central Railroad Company, the owner of the 1,199 bonds of the defendant, with this lien appended to it.

In the classification of Pothier, it is of the third class; the third kind of novation takes place by the intervention of a new creditor, where a debtor, for the purpose of being discharged from his original creditor, by the order of that creditor, contracts some obligation in favor of this new creditor.

Evans, Pothier, p. 340, side page 549.

Pothier in discussing what persons may make a novation, says: *The consent which the creditor gives to the novation of the debt, being equivalent, so far as regards the extinction of the debt,* to a payment of it, it follows that only these to whom a *valid payment can be made can make a novation of a debt. Vice versa,* a person to whom

a debt may be paid may likewise, in general, make a novation; *cui recte solvitur is etiam novare potest.* In like manner a tutor, curator, a husband may make a novation; as may a person having a general procuration.

Evans, Pothier, 343; *i. e.* 555, side page.

The issue between the plaintiffs and these defendants starts with the presentment of this question. It is a fact in this case that this corporation was not behind, in respect to interest, the 28th November, 1878; and when this suit was commenced the demand of the State had been released to her. The plaintiff has no evidence of indebtment against the defendants nor their predecessors in the ownership of the railroads. They have no mortgage, lien or other incumbrance.

They only hold bonds of Tennessee with a promise of payment by the State.

We have examined the testimony afforded in the statutes of Tennessee to ascertain the contractical relation between the State and the company, and it appears that the State considered herself a lender of bonds, the precise equivalent of money, and that the only debt the companies owed was the debt incurred because of that loan to them. Among the acts of Tennessee we find, that at first, the loan of eight bonds per mile was allowed, and afterward the sum was increased to ten bonds per mile; a complete section in the act of 1852 was thirty miles for the first, and twenty afterward; then the alteration was that issues should be made on the completion of twenty miles, and ten miles. The original act required that the road should be "bridged and graded and ready for the reception of rails." Large appropriations were subsequently made of bonds to build bridges, and these are all subject to the same conditions and are comprehended *in the lien of the* 4th section. But if every State bond constitutes a lien on being issued, and the purchaser of that bond acquires a lien on a section, and afterward participates in the general lien, this legislation is unintelligible.

What power has the State, by successive statutes, to crowd issues upon issues to constitute identical liens on the road—the last issues to have the same value as the first? But the State did not regard the holders of her bonds as creditors of the companies, and that consequently no right nor estate of theirs was injured or impaired. These are only a few of the instances of direct assertion by the State of the want of any connection of HER creditors. The holders of these improvement bonds, with this lien, and her entire ignorance of the relations they impute to her as existing at the date of these suits. When the State of Tennessee delivered in May, 1856, and in November, 1856, her bonds, and subsequently till the number of 1,199 bonds were received, independently of any lien, mortgage, or other accessory obligation, there was a direct liability imposed on that corporation, enforceable at law. The bonds were not delivered as a donation or subsidy. The acts of 1852, of 1856, of 1860, and of 1869, all refer to some obligation never formally drawn out and signed, but implied in the fact of the receipt of the bonds by the corporation. This contract, in respect to the mode of performance, is designedly kept open for such legislation as the State might find it necessary to make.

The bonds delivered are intended for sale, and are in a fitting form for sale in the market, without any complication. No party is designated to transfer the bond; it passes by delivery. The contract of the bond has the two parties—the State and the bearer. There being no sale, exchange, letting, deposit of the bonds to the railway corporation, we readily admit, as the State denominates it, there was a loan of bonds to this company. It is not a loan for temporary use, and to be returned in specie, *i. e.* the identical bonds. The bonds are designed for sale, and for circulation, and the negotiation of the bonds might have been assisted by an agent of the State, so that their destination should not be perverted by the corporate officers or agents. The convention between the State and corporation is a convention founded on the loan of State bonds, and on this foundation their relations rest. But we do not assume that

the technical contract is defined or adopted in all of the dispositions which make parts of the convention. There were a large number of borrowing corporations, whose works would not be completed, and be productive for some years. Provision was necessary for the payment of the interest to accrue on the bonds during this period of preparation and of feebleness on the part of the corporations. The State exacted from the corporations a specific security by the fifth section of the act of 1852, for the payment of the interest semi-annually. This interest appeared on the bonds in the form of drafts by Comptroller upon the Treasurer each for thirty dollars; there were 1,199 drafts every six months, for thirty dollars each ($35,970), to be provided for. The State observing that these are drafts, and that she has made them without receiving value in order that the corporation may obtain money, applied to this part of the liability she incurred the law in favor of an *accommodation party*. The person *accommodated* must supply to the *accommodation party* the money to meet the demand with commission and exchange. The more permanent and important subject, the bonds, the contract of loan is, that a certain number of bonds of the same amount, number, and character, shall be restored to the lender, and in case of a failure, that compensation in money may be recovered.

It is not a part of the contract that the identical thing shall be returned or provided.

2 Savigny, des Ob., sec. 72, Mutuum.
36 Dalloz, Jurisp. Gen., p. 795, sec. 193; p. 793, sec. 139.
4 Pothier, du prèt de consomption, pp. 48–64.
Termes de ley, 73, bailment.
Doctor and Student, ch. 38.
Story on Bailment, secs. 283, 370.
Add. on Cont., 514.
Chase vs. Washburn, 1 Ohio St., 244.
Gilpin vs. Howell, 5 Penn., 41.
Fosdeck vs. Greene, 27 O. St., 484.
Hurd vs. West, 7 Cowen, 752.

Smith vs. Clark, 21 Wend., 83.
South Aust. In. Co. vs. Randell, VI Moore P. C. 341.
Mallory vs. Willis, 4 Const., 77.

It is when money is abundant, intercourse rapid, that the circulation of commodities is promoted with facility upon a pecuniary basis. The State of Tennessee, and many of the new States in their early stage of settlement, depended upon exchange and not sales. In respect to another principle apparent in the fifth section of the act, the engagement of a person accommodated by a bill or note of an accommodation party, as implied, is that he will provide funds for the payment of the bill or note at maturity; and that if, owing to his omission, the accommodation party is compelled to pay the demand, he will re-imburse such party with costs and expenses.

Chalmers on Bills, Art. 229.
Sleigh vs. Sleigh, 5 Exch., 514.
Baker vs. Martin, 3 Barb., 634.

In the administration of these statutes, one or other of these rules are observable, as they are in the statutes themselves. The seventh section, relative to sinking fund, in the act of 1852, and the statutes enlarging and developing the principle of the sinking fund, which followed the first statute, this is apparent. The assessment for a sinking fund in that section was to commence five years after the completion of the road. It is probable that no collection was ever made of this fund, under that section, from any company. The *earliest* issue of bonds to the Mississippi Central Railroad Company was the 22d May, 1856; others in November, 1856; some in 1857. Three acts were passed after the war, allowing issues to her. Record, pp. 611–616.

In February, 1856, an act was passed to increase the sinking fund to two per cent. This sum was to be paid to the treasurer of the State. The payment was to commence five years after *the date of the bond.* The Governor, Comptroller and President of the

Bank of Tennessee were to form a board of control and management. This act preceded the issues to the Mississippi Central. In March, 1860, the act for *equalization* and *investment* was adopted. The fifth section is: "*Said companies or corporations may pay said sinking fund in cash, or in like character of bonds that may have been issued by the State for said company, at their face and par value.*"

Section seven is: "The sinking fund in all cases shall be passed directly to the credit of said company or corporation, and be a release to said company or corporation from that amount due by them to the State. Such bonds are to be of the same character as those issued to the said corporation."

Section nine is: "The Comptroller of the State shall keep a regular account against such corporation, charging them with the amount of bonds originally issued to said company or corporation, and crediting them by the amount of the sinking fund paid, and shall furnish the treasurer of State a statement of the amount due by each corporation on the first of June and December of each year, that he may know how much interest each company or corporation has to pay." Record, Exhibit D., pp. 30, 31.

VIII.

The examination we have made is of the statutes of Tennessee enacted prior to the commencement of the war in 1861. In none of those is there a premonition of that event nor of the consequences to result. The Mississippi Central Railroad Company had to sustain a full share of disaster and damage. The principle we have traced in the acts of 1852, 1856 and 1860, of the payment of the public debt by the return of bonds of the like character, was not adopted because of necessity, but as a sound principle of State economy, just to the State, not wrongful to the corporations. It was an exertion of power, a claim of right, the result of which would have been a redemption of all of the bonds long before their maturity. The sixth section of 1856 cited, provided the means of enforcement. One of the first acts on the subject of the debt was

passed immediately after the close of the war, (November, 1865). Ch. IX. This required the payment of a sinking fund of four per cent. by the company severally, during 1867, to be paid in the bonds of the State "on the amount of its indebtedness to the State," and thereafter at the same rate in April and October. All of the transactions in the State bonds must have been made with the means of knowledge of the interpretation which the statutes received. In the statutes passed subsequently to this, of a coercive character, there is no departure from this principle. The act of 1867, directing a sale to be made by the Governor, Secretary of State, and Comptroller at their discretion, as may secure the interest of the State. Of the proceeds of sale, they were to retain "the amounts loaned to said companies and the interest due on the same, with expenses of sale." Ch. 18, 1867–8.

An act passed in 1870 is an act to authorize the sale and transfer of the interest of the State in delinquent railroad companies. This act recites the act of 1867, and declares, "It is important to relieve the people of the burden upon them; and to secure the State from loss in consequence of the issue of bonds to the companies, a sale should be made of the interest of the State in each and every railroad company in the State, which has failed, or shall fail to pay the interest that has accrued on the bonds the State has loaned to it." A commission was nominated with full authority to make and perfect sales, in all cases where the interest of the State of Tennessee demanded for a sum of money equal to the amount of the bonds of the State of Tennessee with legal interest, which sum may be discharged by an equal amount of the bonds of the State of Tennessee with accrued interest."

In the years 1869 and 1870, the substitution acts were passed, with the same signification and import. The suspension of payments had become general in respect to interest on bonds. The State, by the dilapidation and waste occasioned by war, had lost the ameliorations and improvements that her loans of bonds had afforded the means to construct. The property of the State was

reduced, and its productions diminished, so that the renewal of her system became impracticable. The State was involved by the attempts made. The State suspended payments of interest, and the acts for liquidation were enacted to answer the demand for adjustment.

The acts of February, 1869, and of January, 1870, were in force in November, 1878.

The Illinois Central Railroad Company had no connection with the internal improvement acts, while bonds were being loaned to railroad companies. In May, 1872, that company, with a view to open a connection to the Gulf of Mexico through New Orleans, *indorsed issues of* bonds of the New Orleans, Jackson & Great Northern Railroad Company, and of the Mississippi Central Railroad Company, to enable them to put those railroads in perfect order for business, and also to connect at Cairo with the Illinois road. The bonds were negotiated, and that railroad company afterwards found that there had been mismanagement, peculation, and waste, and consequent danger of loss; for the issues were for $8,000,000. That company acquired the bonds, as far as practicable, as the company foreboded the interest would not be paid on the bonds by the obligors thereto.

In 1876, suits for foreclosure commenced, and all of the lines of railroad from New Orleans to Cairo, by acts of consolidation had, in November, 1878, been vested in the Chicago, St. Louis & New Orleans Railroad Company. To place their financial system upon a sure foundation, the mortgage filed with the answer, pp. 230–260, was executed. Among the debts resting heavily upon the Tennessee division, was the lien of the State of Tennessee for bonds loaned to the Mississippi Central Railroad Company many years before, to the number of eleven hundred and ninety-nine (1,199).

When the suits were commenced on the 1st of March, 1876, to foreclose the mortgages to secure the debts of the companies, and to have possession changed by the appointment of receivers, this Illinois Central company found that the State of Tennessee had

anticipated them. R. P. Neely states he took possession of the Tennessee division on the 27th of February, 1876, and he remained there until the 28th of November, 1879. Record, p. 282. This date is the date of the payment of the entire indebtment of the corporations to the State, as shown by the Comptroller's books. Neely says "he paid into the Treasury of the State one hundred and ten thousand dollars, the whole of the arrears of interest, not paid by the corporation."

It appears in this case that some two hundred and fifty bonds, of the specific issues made to the Mississippi Central, had been delivered to the State by other companies and were cancelled.

No reference to such cancellation was made in the accounts of the comptroller with the Mississippi Company for the loan of bonds. But no reference was necessary for any business purpose. The loan of the State of bonds to the company was evident, and none of the debt for the loan had been paid by the company. It is in proof in this case that several hundred had been lost through the misconduct of a New York firm, but the State had parted with the bonds, and the Mississippi Central had to bear the loss as the owner and borrower. In November, 1879, the State had possession, might continue to hold possession for the sinking fund, and proffered, as she had done for near ten years, to novate the debt. Acceptance would liberate the State from the payment of one million, one hundred and ninety-nine bonds for a like sum of money, expressed in bonds of a like obligation, and in the same number of bonds, at the same rate of interest, and due at the same time. The State had said for nearly ten years such a payment would extinguish the debt.

IX.

All of the settlements enumerated in the record (p. 46) are impeached by a single plaintiff, who assumes the entire responsibility, and claims the entire legal interest in the suits. The bill in this suit discloses the ownership of six bonds, having an aggregate of

coupons unpaid between 1st January, 1876, and 1st January, 1879, both inclusive, $1,260.

Now, it appears that Neely, on 28th November previously, had paid $110,000, the sum due at that date, upon the entire issue of 1,199 bonds to the company. The plaintiff testifies that he never applied to the railroad companies to pay his past due coupons prior to bringing this suit, nor did he ever notify them that he claimed to hold a lien on their property prior to the bringing of the suit. We assume that his statements, for the purpose of the discussion, to be true.

The question to be decided is, did the State of Tennessee have the power to novate the debt, or accept payment of the debt, which the Chicago, St. Louis and New Orleans Railroad Company, as succeeding the Mississippi Central Railroad Company, acknowledged to be due to the State as borrower of her bonds under the acts of 1852 and 1856.

We have stated the facts, as existing in the records of the public offices of Tennessee. The relation between the parties—the State and the company—is that of borrower and lender of bonds; creditor and debtor in a contract of loan of public securities.

We find that the Treasury books are kept under the legislative direction since 1860, but do not differ from what was before the habit of the offices. We find in the same offices, that the bondholders are not mentioned as creditors of the corporations, nor as parties having any claim on them. The funds collected from the corporations are *State* funds, dedicated to a general class of issues, called loaned bonds, and not applicable to the payment of issues to an individual corporation, or to a special class issued to any corporation. The statute of February, 1869, is only an expression of the sentiment, universally held in administration, that the corporations owe to the State the amount of the bonds loaned; not the same bonds, but bonds to correspond.

We recur to the law of the relation of borrower and lender, and these acts express that law. In one of the parables, a man of

wealth is described as delivering to three of his servants large sums of money, each according to his ability. The two having the largest sums traded successfully, and reported satisfactorily. The third, and the inferior, seems to have misunderstood the object, and supposed that he was to return the identical talent he had received. Taking an alarm, as having an austere master, he buried it, and kept it safely, and returned the identical talent he received, and said: "Lo, there is that which is thine." The austere master berated him strongly.

The first two understood their obligation to be *mutui datio*, the third his to be *de commodatum*, the same error this plaintiff seems to suffer under.

The former imports an ownership in the property delivered, and with full powers to consume it or sell it. The latter imports only safe keeping and certain return. Payment in the last case is complete only, by the return of the same things. Payment in the former, of those of the same kind. The payment of all the bonds with the interest thereon, issued according to the provisions of the act to the Mississippi Central was complied with, *verbum post verbum*, in the settlement made the 28th November, 1870.

The authors of the act of 1852 distinctly understood that the payments to be made by the companies were to the State, and the State only. The bonds of the State were to go forth in the name and credit of the State alone. The State had tried a partnership, or joint interest in improvements; she had indorsed bonds and became a surety; these relations were not satisfactory.

She then determined to become a creditor with sovereign powers of legislation to secure herself from loss. We find that the result has answered some of her expectations.

The manifest purpose of these acts as understood by the State and by the corporations, and by the bondholders, this plaintiff—owner of six or ten bonds alone—proposes to overturn, *contra totis viribus*.

The plaintiff, upon his examination as a witness, produced ten bonds. He does not state with any definiteness the time when he

became the owner of the bonds, beyond the fact that he had them when he commenced the suit. He states the purchase of two, and the price paid for three—the highest price being $525 a bond with the coupons. One was purchased for $400. When these purchases were made, the fact that the railroad had been seized by Tennessee and had been managed by a receiver for a long period, he had the opportunity to know, and the record shows that the settlement of this claim was looked to with some interest, and when concluded, with satisfaction by the association of bondholders. The letters in the record show this. Record, 299, 740, 741, 742, 743. The mortgage executed by the Chicago, St. Louis and New Orleans Railroad Company, with the Tennessee lien attached as a security, was the precise matter referred to in these letters. This plaintiff declares in his testimony that he has made no demand on the corporations, nor exhibited any claim, nor made any effort to obtain satisfaction from them, except through this bill.

The act of February, 1869, of the State of Tennessee, had remained in force nearly eleven years before the defendants made use of the overture that act addressed to the railway corporations in similar conditions with themselves.

At this time none of the adjustments made had been impugned in a judicial tribunal, although all of the questions arising here had arisen in each settlement made. The holders of the State bonds of Tennessee observed these settlements without intervening as parties thereto, or as objecting thereto. The settlements were made under laws passed by the Legislature affecting subjects of the State, and property interests of the corporations in the State, and the interests of the State, and all submitted and the laws remained. In addition to this, in terms which admit of no diminution or mistake, the right to pass those laws was claimed to exist, and the purpose to pass them made manifest by habitual practice. The plaintiff buys these bonds with knowledge of the conditions existing. He offers bonds to the State upon terms of compromise, and admits he is a purchaser as well as seller of bonds.

The validity of these acts have been recognized in the fact of their enactment by the Legislature of the State, having all the legislative power of the State to support their action. The judicial power of the State has supported them in the administration of justice, and this judgment was made before this settlement in the sales of the insolvent railroads—the accumulated usage under these acts, until the whole of the railroad debt to Tennessee has been extinguished by sale and settlement.

X.

The validity of the act of February, 1869, is determined by all of those indicia which determine statutes to be valid.

It was enacted by a legislature endowed with full legislative authority, and has not been altered or modified in any manner, except to make the principle more explicit and effective. In all cases before the courts it has been accepted. It conforms to principles contained in all of the acts of the legislature. It has been employed in a multitude of transactions of settlements where large interests were involved, without opposition from interested parties. The accumulated evidence of usage and acquiescence and pecuniary investments upon it, all corroborate and strengthen it. None complain save those bondholders who preferred to hold on for a better settlement with the State, and have not been successful.

When the receiver Neely took possession, in February, 1876, the Mississippi Central Railroad Company had lost its identity by a consolidation with another corporation with another name. This consolidation company had not fulfilled engagements to Tennessee either in the payment of principal or sinking fund, and had not expended the money on the road, the State had advanced. One of her agents had perverted 400 of the bonds. The sinking fund had never been paid. In November, 1878, the opportunity for a final settlement had arrived, and the State, the successor to two or three intermediate corporations, had purchased the road under a foreclosure and was willing to extinguish it. No debt existed

against this company, only a lien on the railroad for the bonds loaned to the dissolved corporation. The interest in full had been collected. The question was only of the amount due for bonds lent and consumed; a large number having been run away with. With whom may the corporation deal in this emergency? The railroad is held by the State because the State is invested with a lien, without a deed from the company upon the entire railroad, and every part and parcel of it, superstructure and equipment, and all accessories for the payment of all of said bonds issued to the company, as provided in the act of 1852.

The State, possessed of this lien for the payment of the bonds issued to the company as provided in the act, had proposed, near ten years before, to accept bonds, bonds alike those delivered to the company, and this law was acted upon, none objecting thereto. The payment as proposed is a payment according to the act.

This plaintiff asserts that the bonds themselves are the mortgage, thus none can deal with the subject except he has bonds. The bonds constitute the lien. With the six bonds described in the bill, he proposes to override the decisions of the State, her judiciary and legislature and undo the corporations.

The acts themselves do not show more than a semblance of plausibility to the assertion. The statute of 1852 speaks of the bonds as constituting a lien, but immediately and in describing the lien the statute declares as the consequence of the issue of the bonds, the State of Tennessee is invested with the lien, without a deed for the payment of the principal and interest in the bonds. This language refers to the sectional liens. But all of these fragmentary liens were absorbed and merged into the general and permanent lien described in the last paragraph of the fourth section of the act, which was invested in the State upon the completion of the railroad, and which subject all of property the company has within the State. The State regarded the bonds as the evidence that she had made a loan of a certain sum in bonds to the railway company; that by the issue and delivery of those bonds the relation of bor-

rower and lender had been established for the sum, the bonds so delivered expresses. This issue and delivery of the bonds had the consequence to subject the corporation as a debtor, and to secure her she was, by the declaration of the act, and without the ceremony of the execution of a deed to state the details, she was invested with a lien, for the payment of the bonds—the equivalent, for the payment of the debt created by the loan of those bonds. On this principle, the State has conducted her complicated and embarrassing administration during the thirty years.

The bonds delivered were the bonds of the State. When delivered to the company they became the property of the company, with no condition but that they should not be sold for less than par and the money should be fairly applied to construction and equipment of the railroad. The State was the only promisor—alone, ostensible, and responsible party to pay interest and principal—the only name damaged by the non-payment at maturity of coupons of interest or principal. The State took an investiture of a lien on all of the property and effects of her borrower of bonds, to be held for the payment of the bonds and the interest thereon. Who is to receive the payment is the question? The answer is inevitable—to the lender of the bonds. The lender must make the payment of the bonds to the holders to fulfil her engagements. Her promise circulates, the coupons are drafts of Comptroller on her Treasurer. The Treasury must be supplied in advance to enable the Treasurer to make the payments semi-annually. None other can make the payments. We hear of no demand, nor correspondence of any bondholder with the corporations relative to the payments at any time. This plaintiff, the most adventurous of all, never made demand, claim, nor gave a notice that he had a right. How is it with the State and the corporations? The corporations could preach with effect upon the text that the borrower is servant of the lender. A multitude have been sold out, bag and baggage, superstructure and equipment. The State has employed her lien with potency and vigor, and under extraordinary conditions with practical ability.

These acts of Tennessee might have been drawn with more precision, but the policy and measures show a strong and resolute will and vigorous statesmanship. If the arguments of the plaintiff were well founded, the State would have surrendered her lien whenever her bonds were sold by the companies, for they say the mortgage is in the bond.

The plaintiff tells the Court that bonds of this issue are floating in Europe; if so, the lien floats along with each one. The scattering of liens that affect some thirty different corporations in different parts of the same State, under different boards, could possibly have been of no advantage. If the bondholders had interfered, there might have been confusion and embarrassment, or there might have been dilapidation, peculation or corruption. Unity of administration in these works is absolutely necessary, and no construction, which implies that such rights and powers are to be scattered in every direction, can be indulged as rational.

The twelfth section opposes an invincible argument against such a conclusion.

It is difficult to say at this distance of time, and dearth of testimony, what were the precise influences that dictated the adoption of the measure to establish a system of internal improvements in that State, and what combinations were made; but to any one practiced in American politics, the bare array of fifteen railway corporations, staggering under a load they could not hope to carry with any ease or profit to the members, is a circumstance to be considered. We look with anxiety to find the conservatory elements in the act, and naturally inquire where are the *defensores civitatis*. In this act they are found in the fourth and twelfth sections, and are displayed in the securities taken to compel the payment of the semi-annual interest and the provision for the payment of the debt by the instrument of a sinking fund. The only mastery over such bodies is to be found after all in the people represented by their civil government—Governor, Senate and House of Representatives.

This faculty of masterdom is provided in the act, and in a judicial view the ownership of the property, in the whole and in every part, with the powers of entry for control and management, and correction of abuse, are the most effective instruments. With a strong, vigorous, uncorrupt and resolute race as Tennessee had at the date of these acts, to place in her State government the act, does not seem now to have been greatly misconceived. They had confidence in themselves, and it is questionable whether their confidence did not abate directly as the squares of the distances in respect to the rest of the human family.

XI.

The Illinois Central Railroad Company was the owner of the eleven hundred and sixty-nine bonds which were executed by the Chicago, St. Louis and New Orleans Railroad Company, to raise the sum needful to pay the State of Tennessee, and these bonds are substituted to the rank, and to succeed to the rights and powers the State had to vindicate and enforce the priority of the debt, which she had against the Mississippi Central Railroad Company. What is meant by the words "that when the whole road shall be completed the STATE OF TENNESSEE *was invested with a lien* without a deed from the company upon the entire road" is illustrated by the official conduct of Neely. Record, p. 282. He was appointed receiver by the Governor, 25th of February, 1876, and remained in possession till the *debt* was paid, 28th of November, 1879. He paid the State Treasury $110,000. He had collected, as revenue from the road, $802,241.62. He operated the road as a local road, and run it to make the most of it for Tennessee. There was an effort to pay off the interest by the debtor corporations, but the Governor stated "that he would not give them possession of the road, until the whole debt was paid: the State would receive any of her outstanding bonds in payment."

It will be observed that the four per cent. of sinking fund, due in 1867 and thereafter, was still a charge on the railroad from the State about fifty per cent.

The State, with this lien invested to the exclusion of all other liens existing, or to exist, still was subject to some law. She had made in the acts of 1869 and 1870, offers of the most reasonable character, not simply to her debtors — the railway corporations — but to her creditors—the holders of the bonds of the State.

The offer was made to the creditors of the State, to pay any part or portion of the debt of the corporation to the State, and that they shall have, hold, and be subrogated in all the rights, privileges, and liens of the State to the extent of, and in the proportion to the amount of such indebtedness. Sec. 8, act of 1869.

The same offer was made to all of the corporations in the first and second and fourth sections of that act.

The seventh section of the act made the offer to any individual or corporation to come forward and pay the debt of the State and take the lien of the State. In each of these cases, the corporation must consent. Without such consent, a third person having no interest cannot pay the debt of another and hold it, with subrogation of the accessories.

The debtor corporations were unfettered. All others might intervene to make the payment and acquire the first mortgage on the railroad. This offer was open to the association of bondholders from February, 1869. The testimony shows that there was no great alacrity with any one of them, unless the first two. In the Roman law the creditor was to consent to the subrogation of the securities in his hands, called in that law, substitution or succession.

The system was introduced into France to meet a condition not unlike that with which Tennessee was placed in 1869 and 1870. A very large portion of the securities in France are called *rentes*. In the time of Henry IV, upon the restoration of prosperity and order, the price of the *rentes constituees* had fallen one-fourth. The country was burdened by the excessive charges for money in the time of commotion during the reign of Charles IX.

The debtor could not redeem, for his property was burdened with the charge existing to all of its value.

The creditor would not consent to subrogate his securities.

To enable the debtor to avail himself of this reduction of *rentes*, an edict of the king, promulgated in May, 1609, enabled the debtor to borrow the money, with which to make the redemption, and as security for the specific loan applied to the specific object, to *subrogate* the *lender* to the hypothecations and pledges, which the creditor had held. The application of the loan was a condition without the performance of which the subrogation had no operative effect. The word subrogation came into the vocabulary of the civil law with this edict, having had a meaning similar to substitution and succession in the canon law. The Parlement of Paris in the year 1690, decided, that the rule of this edict should be applied to all cases similar, and was not to be restricted to *rentes constituees*. The code of Napoleon incorporated it as a part of the chapter on payments and was transferred thence to Louisiana. The edict is commended by jurists and by statesmen.

Gauthier, de la Subrogation, secs. 123, 240.
Merlin Rep. to. 32, secs. 2, 4. *Verbo Subrogation.*
33 Dalloz, Jurisp. Gen., pp. 399.
Demolombe, des Ob., to. 4, secs. 391–4.

Tennessee, in 1869, found that her efforts to re-establish her railroad corporations were impracticable. The expenditures she had made for the constitution and equipment had in many instances been wholly unproductive, and the work done and property purchased, had been destroyed. Her lien was in many cases confined to the road-bed.

This lien was prior, paramount, and engrossing. It was a barrier to any improvement of the property. The statutes placed the lien before all parties interested, at its cost, in the bonds of the State of Tennessee, of the kind which had been issued for internal improvements. No one bond or bondholder was excluded under the terms of the act for participation. Nine years and nine months had elapsed from the enactment of the law of 1869, before the

Illinois Central Railroad Company completed the settlement with the State of Tennessee.

The State had acknowledged payment in full of the debt contracted with her, by the Mississippi Central Company, by the acceptance of a loan of her bonds under the acts of 1852 and 1856. So the receipt describes the bonds when received. This was the primary obligation of the Mississippi Company. This was the basis, the support of the lien, which had been vested in the State and to which this lien was accessorial, and as were all of the various remedial processes, rights of entry, demands for deposits to pay interest, and sinking fund. The general meaning of the word payment is liberation; a more restrictive meaning is the delivery of a thing which ought to be given, or the performance of the thing to be done; the real fulfilment of the thing to be done or given, according to the obligation; "*Praestatio ejus quod in obligatione est.*" In the settlement with the State, the Mississippi Central was represented by successors to her rights in the railroad property, not a debtor otherwise. These successors came to disencumber the property, it being in the custody of the State, because of a delinquency in the non-payment of interest under the laws of the State. A person succeeding in the title, has a recognized right to pay off the incumbrance and to relieve the estate from incumbrance. The bargain was concluded between these capable parties, and the State is paid in full according to her demand.

The Mississippi Central Railroad Company was liberated; the claim of the State against *her* is extinct. But the effect of the payment extends to the accessory obligations, the hypothecations, liens, rights of entry. Neely, receiver, retired from the railroad with his staff. No one complained at the time. Mr. Calvin Amory Stevens, some weeks after, having forty-two interest coupons unpaid on bonds originally issued to the Mississippi, amounting to $1,260, we have a strong impression that this Court will not listen to an appeal that does not rest upon a broader pecuniary foundation.

XII.

We are unable to find a standing place for the plaintiff in this Court, or in the Circuit Court. His demand is founded upon forty-two interest warrants, all alike. They are drafts of the comptroller upon the treasurer of Tennessee for the sum of thirty dollars each, for semi-annual interest on bonds from the first of January, 1876, to the first of January, 1879, both inclusive. We have conclusive proof that all of the interest payable on the amount of bonds lent to the Mississippi Central by the State of Tennessee, which had been previously collected, was collected by R. P. Neely, as receiver of the State, appointed by the Governor under the fifth section of the act of 1852. He vacated the railroad 28th November, 1878, having paid $110,000 into the treasury of the State for the full sum due by that company. In respect to none of these coupons is there evidence of presentation according to the tenor of the warrant. During the period from 27th February, 1876, to 28th November, 1878, the whole of the railroad was in the possession of the receiver. The payment to the treasurer was several weeks before the suit was filed. The bonds do not mature until 1892. The question of the application of the interest is one that never did in any manner appertain to the railway corporation.

XIII.

The fundamental principle that agreements can have no effect except between the contracting parties, and that a creditor can demand performance from the debtor and his representatives, and cannot demand nor be required to accept performance from a third person, is set at naught in this bill. The principle that no third person can become entitled by the contract itself to demand performance of any duty under the contract, is equally disregarded.

Pollock on Cont., ch. V., pp. 171–174.

Anson on Cont., pp. 193, 194.

Pothier on Ob., ch. 1, art. V., p. 29.

The principle that a person who is not a party to a simple contract cannot sue on that contract, and consequently that a promise made by one person to another for the benefit of a third person, who is a stranger to the consideration, will not sustain an action on it.

Exchange Bank vs. Rice, 107 Mass., p. 37.
Mellen vs. Whipple, 1 Gray, 317.
Locke vs. Horner, 131 Mass., 393.
Eley vs. Positive Co., 1 Exch. D., 88.

To give a third party, who may derive a benefit from the performance, an action, there must be first an intent by the *promisee* to secure some benefit to a third party, and second, some privity between the promisee and the person to be benefitted, and some obligation or duty arising from the former to the latter, which would give him a legal or equitable claim to the benefit of the promise.

Vrooman vs. Turner, 69 N. Y., 280.

In Garnsey vs. Rogers, 47 N. Y., 233, the Court say: "To entitle the third person to an action the contract must have been for his benefit. In this instance the contract was between the State of Tennessee and the Mississippi Central Railroad Company, and none other; it is without form, and is deducible from regulations, requirements, directions, and commands, over a series of years.

The immediate subject was the loan of ten bonds of the State for every completed mile of railroad within that State, on a line projected by that corporation, and the *State, for the re-imbursement of that loan, was invested with a lien* on all of the property of the corporation in the State. The bonds were in the form of bonds payable to bearer, and were for sale, and were sold. The obligation to re-imburse was created at the time of the reception of the bonds by the company, and the duties of re-imbursement are detailed in the sections of the act of 1852 and other acts, and under a reservation

of right to make all such laws as should be deemed necessary to secure the State from loss and to protect her interest.

It was fully understood, as well by the State as by the company, that no third party was contemplated as having any direct connection with the contract, nor to be concerned with its execution or enforcement, and that all that would accrue to any third person was an incident, and consist merely by the addition it made to the resources of the State to enable her to fulfil her obligations. With this understanding, in 1879, the State and the company had a full and final settlement, and the company was released and discharged.

The plaintiff murmurs and complains as if the arrangements of the defendants had been made to defeat his ventures in six Tennessee lien bonds, with forty-two coupons, at from forty to fifty-two per cent. a bond. That no alienation of contract or of lien was imagined by the authors of the legislation in Tennessee, is apparent from the absolute control which was given to the executive department of all of the various remedial processes and powers to be found in the act in respect to the defaults and delinquencies of the corporations. The possession of the contract and the accessorial estate and the powers attached were necessary to the development, management, and operation of the system.

XIV.

The body of statutes which were enacted in the State of Tennessee were not intended to impart contracts, nor to vest rights in all the cases where directions are given, regulations imposed, or duties to be discharged, though conventional obligations do arise. The State proposed to introduce a system of internal improvements within the State by the grant of aid to a large number of corporations, and by the imposition of regulations, and the direction of measures needful to the organization of the system. The State had a very great control, for all of these works were of a public character, and when completed formed a part of the public domain. Her powers were fortified by the relation she established at the

outset as a creditor, having a paramount and exclusive lien on the property of the corporation. The State invests herself with an estate in every element of property of the company in Tennessee. The State did not intend to create a trust in favor of her own bonds. The State was directly and exclusively liable to the holders of these bonds.

The bonds contained a direct obligation to the holder, whomsoever he might be, and without any care upon the part of the State to ascertain him or to designate him in advance. The lien was reserved to the State to enable the State to exact from the corporation, means for her treasury, and to increase the resources for payment. The State undertook to manage her own financial affairs, and her own relations with her corporations, without the agency or aid of the bondholders. The relation of trustee and *cestui que trust*; of principal and surety, as legal or equitable relations among these parties. The State prohibits the existence of a conflicting lien. *It denies to the corporation to give, create, or convey, to any person or persons, or body corporate whatever, any lien, incumbrance, or mortgage, of any kind, to come in conflict with her lien secured in that act.* She annuls any such lien, incumbrance, mortgage, as against this: *And that the lien and mortgage of the State shall have priority over all claims existing or to exist against said company.* It is the disposition of this lien by the State through LAWS *deemed necessary by the legislation to secure the State from loss,* which is arraigned by this plaintiff. No case has ever come before this Court that presents such a body of argument to require its rejection.

Chamberlain vs. Sioux City, 92 U. S., p. 306.
Wilson vs. Boyce, 2 Otto, 221.
Woodson vs. Murdock, 22 Wall, 351.
Murdock vs. Wilson, 2 Dillon, 188.
Branch vs. Macon Railroad Co., 2 Woods C. C., 388.

The Lord Chancellor Cairns, commenting upon the terms of a will which gave uncontrollable discretion to trustees, said: "The

trustees are not merely to have discretion, but they are to have 'uncontrollable'—that is, uncontrolled discretion—their discretion and authority, always supposing there is no *mala fides* with regard to its exercise, is to be without check or control, from any superior tribunal.

"What is the subject matter with regard to which they are to exercise their discretion and authority? The subject matter is the payment or the application, not merely of the whole income of their real or personal estate, but of such portion as they deem it proper to expend. It is for them to say whether they will apply the whole, or only a part, and if so, what part, and how are they to decide if they do not apply the whole; what is the part they are to apply?

"They are to decide upon this principle that it is such part as shall be sufficient, not such part as shall be demanded by or for the person to be benefitted, but such person as they shall deem expedient; and upon the question of what is expedient, it is their discretion which is to decide, and that discretion according to which they are to decide is to be uncontrolled." This analysis of the terms of the will might be applied to the terms of the 12th section of the act of 1852. The Lord Chancellor, when asked to apply rules, which, sometimes, the chancery employs to direct and control trustees, answers: "MY LORDS, to do so would simply be to reverse the words used by the testator, and to say that the discretion which is given to the trustees by this will, and which is stated *to be uncontrollable, shall be controlled and be subject to that rigid and unbending rule upon which the Court of Chancery acts upon those occasions when it has to perform the functions,* WHICH IN THIS CASE THE TRUSTEES and not the court have to perform."

Gisborne vs. Gisborne, H. D. 2 App. Cor. 300.

Tabor vs. Brooks, 10 Ch. D., 273.

The twelfth section enacts that the State of Tennessee *expressly reserves the right to enact by the Legislature thereof, hereafter,* ALL

such laws as may be deemed necessary to protect the interest of the State, and to *secure the State against any loss in consequence of the issuance of bonds under the provisions of this act*, but so as not to impair the vested rights of the stockholders of the companies.

The reservation is of right to enact ALL laws *deemed necessary* for the exigencies described. The power reserved is the legislative power of the State, to be called into exercise when deemed necessary.

This enactment imports that the system as propounded is provisional, and that additional measures deemed necessary may be engrafted upon it. It implies that under adverse conditions, which might possibly occur, that the power of the State to secure her from loss might be exercised without constraint other than that stated in the last line of the section, in the form of remedial legislation deemed proper. The case which has occurred is the disruption of the entire system of internal improvements established in the acts by the casualties and calamities of war.

We are not aware of any instance of a corporation escaping a wreck. The demands of the State for interest and for a sinking fund were disregarded, the credit of the State was impaired, and her contracts were not fulfilled. To secure the State from loss the act of 1869 was enacted, which proposed a liquidation of the State debt. The object was to call in her bonds by the employment of the lien of the State, by its cession, or sale, or release.

If the fourth section of the act had declared a direct trust to pay the specific bonds to the very holders of the bonds, that case would have been within the terms of the act, with the 12th section therein. No principle of the Constitution of the United States would be affronted by the enactment of the law of 1869, under the conditions of that act. The act of 1869, as we have stated it, allows to the corporations to pay their debts in the bonds of the State; it allows any holder of bonds to invest them in the purchase of an interest in the lien of the State. The aim of the State was to secure the State against any loss in consequence of the issue of bonds under the act.

XV.

The validity of a payment depends upon the fact that it is made to a proper person, to the creditor competent to receive it, or his assignee, or to one charged to receive it, or who may be authorized by law or by judicial authority to receive it. The Chicago, St. Louis and New Orleans Railroad Company was in pursuit of this person sometime before the 28th November, 1878. They were owners of the property subject to the Tennessee lien. Tennessee had possession of the property, and would not surrender without payment of the demand of the State for the debt on account of the loan of the bonds. Where was the owner of this lien? The State had been *invested* with it for the purpose of being paid the amount of the bonds she had issued and loaned to the company. The State had now obtained a corporal investiture of this estate, and had the occupation of the property. But more than this, the statute of 1852 had always designated the State as the party to receive the money, and to deal financially, as creditor of the company. This was done in the delivery of interest fifteen days before the maturity of the coupons; so in respect to payment of the sinking fund; so in the recovery at the maturity of the State bonds. This being the condition, none but the State could call on the corporations for moneys. Regarding these acts as conventional (without the aid of the section), a requirement on the companies to pay otherwise, and elsewhere, and differently, would be a departure. Supposing the fact to be as this bill states, that the corporations are debtors to these holders of State bonds by some sort of the webs and meshes and entanglements which are so creditable to legislative enactment or to judicial administration, what then? Since the acts of the legislature of the State under which the bonds have issued, designate the officers of the State to receive moneys to be paid by the corporations for the interest, for the sinking fund and for the final payment, at least the State is *adjectus solutiones gratia.* Tennessee, at least, is a delegate of the

creditors to act in their behalf, as well as the delegate of the corporations, and all of the administration is, in consequence, unimpeachable.

Regarding the State as holding this position by common consent, there can be no dispute of the validity of the acts of the State in reference to the receipt of payments.

Suppose the case that none but bondholders might receive payments,—the corporations should have had agents at New York to receive their remittances of interest; they should have published their vocation to pay coupons on the series issued to one railroad; they should have published the marks of the bonds to direct the holders to the place of payment. Each sinking fund would have found a different depository; the State, the obligor on the bonds, would have had no function to perform in the matter of this administration—or in paying her own bonds—the *reductio ad absurdum* is sufficiently manifest.

XVI.

The demand of the plaintiff is, that the priority of the lien of the bonds *he presents to the Court*, upon all of the railroad, the equipments thereon, incomes, tolls, rights, privileges, and property of the Mississippi Railroad Company be declared and be enforced by seizure of the property. The bonds he presents mature in 1892, so the demand is reduced to the forty-two coupons which were due and not paid to him by the State. The State had collected her demand of interest, so that a single coupon on each bond is alone the matter of discussion.

The bill reposes alone upon the words in the third section of the act, which enacts that so soon as the bonds of the State shall have been issued for the first section of the road they shall constitute a lien upon said section, &c. To support the argument of the bill a South Carolina case is produced, wherein a similar act was construed by the Supreme Court in that State; Hand vs. Railroad Co., 12 S. C. Rep., 314. That case is one where the debtor com-

pany, the owner of the railroad, issues the bonds for the specific amount allowed, and the State, under the provisions of the act endorsed on the bonds, certifying the act had been complied with by the company, and that the full and complete payment of the bond is guaranteed, and the faith and funds of the said State are pledged to secure the payment of the principal and the instalments of interest becoming due. The point of discussion was whether this constitution of a lien and its investment in the State for the payment of the bonds so endorsed, enured to the holder of the bonds. The members of the Supreme Court of South Carolina were divided upon the importance of the term "constitute a lien," and Judge Heiskell makes some pertinent observations upon it. It is one of the traditions of the Supreme Court here, that Maryland and Virginia disputed which State produced the better quality of hams, and submitted to the Judges of the Court specimens from each State of the same number; the members of the Court then formed a mess.

The Chief Justice, at the end of the term, announced that the Court decided but one question: That the Maryland specimens weighed the most, and reserved all other questions, with permission to either party to furnish further proofs. The opinions of the Chief Justice and the concurring Judge in South Carolina with a report of the Master in South Carolina, on the whole, are more ponderous than that of Judge Heiskell, and this is all that need be said about them.

The case in this Court is one where the railroad company is not a party to the bond as principal, endorsor, or guarantor, and has not made a contract with any but the State; that is, a contract of the borrower of bonds, and to perform every duty and obligation arising out of that relation, as the State shall declare by her laws is incumbent upon her to secure the State from loss.

A portion of the duties of the company are defined in the act, and the character of the intimate and exclusive relation between the State and the company becomes apparent, while the separation between the corporations is in the same manner conspicuous. For

the validity of a convention even unilateral, the consent of the party to be bound by it, as well as the consent of the party to whom the fulfilment must be made, must be shown. So long as there is no reciprocity nor mutuality, there cannot be a convention. Since every convention implies the concurrence of two or more minds upon the same proposal, we must look to the proposition or offer and the acceptance, to ascertain whether there be such concurrence.

Have the minds of these numerous persons met at any time at the same rendezvous? The identity of the offer in this case does not consist merely in the fact that the State shall grant aid, and the corporation accept the grant, but running through the various acts there are clauses and conditions, there are persons to whom they are addressed, and persons who must receive them. It is necessary if that a convention so composed be made, there shall be concurrence. In the offer of the State of Tennessee, the well defined object is the organization of a system of internal improvements in that State, to be effected by the co-operation of railroad corporations to build their respective roads, in so far as that an advance of ten State bonds for each mile shall be adequate to the entire fulfilment of the project. The State consents with the corporations, on their accomplishment of a described portion, to advance the bonds to the company, and is invested with a lien according to the fourth section of the act, for the payment of the bonds delivered to the company; the bonds are thus delivered to the corporations as their property.

At this stage we find a separate contract—the State acting for herself, and the corporation binding itself, by the acceptance of the bonds of the State, to all of the distinct conventions which are implied in a contract of loan, as existing in the common law, and as modified in the statute of 1852, or other statutes which may be framed under the 12th section of the act.

The conditions established at the date of the delivery of the bonds can continue without other relations, other contact, without

confusion, without reference to, or approximation with, the statutes of Tennessee, of any new person or party.

The bonds of the State are separate, distinct and sufficient—calling for no support, assistance, or connection with any other individual. They differ from the bonds of individuals, as reposing upon the faith pledged by the State on their face. No demand, protest or notice are needed. No action of covenant or debt can be made to have a judgment or execution. The obligation is not juridical, but settlement is sought for from comptroller and treasurer.

The State is the only promissor, and payments must be sought at the treasury, or from agents of the treasury. The purchase of the bonds delivered to the corporations in the market, does not connect the purchaser with any one beside the promissor of the bond and the conditions expressed on the face of the bond.

XVII.

The relations established in these statutes are all legal relations. They are imposed by law, essentially revocable in their nature, and to be altered or modified as an occasion may require. That a person may acquire rights or be subject to obligations as the effect of a contract, the least that should be asked for is there should be a consent or purpose manifested. Conventions have effect only between the contracting parties and upon a sound principle; they do not injure or profit any third person.

The parties to these improvement statutes are the State of Tennessee, dealing with the subject matter as a legislature imposing rules of action, and the corporations are subjects owing obedience to those laws by fulfilling in advance conditions precedent. The duty imposed by the law is direct and is the precise consequence of an assent to the law as made. There is no *equitable estate*, right, title, interest or property *invested in the State*, or other person separate from the legal estate. There is no use for a Court of Chancery to decide upon matters of conscience. The State has set

down in the statute what she will enact as laws under some circumstances, and what provision she will make in the future in respect to the corporation.

Story's Eq., Sec. 964; 2 Atk., 612.

The State holds no position as trustee; she has no *cestui que trustents.* The corporation has accepted a loan of 1,199 of her bonds, sealed with her seal, and suitable for sale. She invests herself with a supreme lien, a legal estate, and right which she will hold until she is liberated from the obligation contracted by her in the issuing of those bonds and their delivery to this corporation. There is no debt nor duty imposed upon any person but the corporation; the State comes under no obligation to any other by the investiture which has taken place. The precise purpose of the fourth section of the act of 1852 was to settle the relations between these parties. Nothing was before them but the immediate relation to be established at the delivery of the bonds and at the time the work had been completed by the railroad company. It will appear from these facts, from a consideration of the different sections in the statutes, and the usage under the statutes, and the character of the laws subsequently made, that the State of Tennessee had no thought of offering further assurance to the purchasers of her bonds; or of placing them in any connection or contract with the railway companies, or of transmitting to them an interest in the railway property. Her purpose was to obtain an estate adequate to enable the legislature to legislate with vigor when it might be necessary for the public good. The relation of trustee and *cestui que trust* does not exist. In the Louisiana cases in this Court there was a similar attempt to evade the relations determined by constitution and laws, by doubtful interpretations and oppositions of science so called.

In those cases there were facts that taxes had been pledged in express words; some had been collected and were apart from other moneys; some were in process of collection; there was a corporation which might assess, collect and distribute the taxes

for the future. We have nothing to do, it was said, but to write the decree. But a sober-minded, sincere, magnanimous obedience to the constitution as the supreme law does not admit any indulgence of the oppositions of science, falsely so called. The decree could not be written; the only debtor the plaintiffs have is the State of Tennessee. The only contract the plaintiffs made was to acquire as their property her bonds. The defendants are not debtors.

XVIII.

The obligation of that State in this Court is an imperfect obligation, for the reason that the constitution prohibits a suit to enforce it. The lien of the State of Tennessee is a real right, an estate, an authority obtained by her own declaration, without a deed from the corporation, and invested in her. It is possessory, for the State may take possession under her estate and because of her laws. The same objection arises in reference to seizure of the property as existed in the Louisiana suits. Pollock in his chapter upon imperfect obligations makes a summary of the law.

An imperfect obligation is an existing obligation which is not directly enforceable. This state of things results from exceptional rules of positive law, and especially from laws limiting the right to enforce contracts by special conditions precedent or subsequent. When an agreement of imperfect obligation is executory, a right of possession, founded on the obligation, can be no more enforced than the obligation itself.

Pollock on Cont., p. 600, Am. ed.

This right of possession to the property of the Mississippi Central Railroad Company was invested in the State of Tennessee by the lien she retained, and the executory process she reserved in her statutes commencing in 1852, and which are implied in the statutes regulating the sales for default for two years in the payment of interest and default in the payment of the sinking fund.

No transfer of this lien was made by the State, and there is no means by which the plaintiff can withdraw it by judiciary action. The State is not the subject of the judicial power.

Louisiana vs. Jumel.
Elliott vs. Wiltz, 107 U. S., 711.
Troy vs. Commonwealth, 127 Mass., 43.
Connecticut vs. Shelton, 47 Conn., 400.
Sloman vs. Governor, 1 C. P. D., 562.
Parlement Belge, 5 Prob. D., 605.
State vs. Burke, 33 Ann., 498.

XIX.

The jurisdiction of this Court in these cases is invoked upon some impression that there exists some *equity* which binds the conscience of the State of Tennessee, and that the Court can be called upon to direct and guide that conscience to the adoption of their prayer to substitute the holders of these bonds to the rights and faculties of the State in her various acts of legislation. The constitution of the United States has opposed a barrier to all enterprises of good and benevolent Courts or judges to amplify jurisdiction. The disclaimer is of the existence of judicial power in the United States, and a direction that it shall not be employed. In Casbird v. Attorney General, the Ch. Baron Richards says "very considerable difficulty has occurred in the consideration of cases between the subject and the crown, from a doctrine which is well founded to a certain extent, *that there are no equities against the crown.* I felt early in this cause the embarrassment which arose from the doctrine that the crown cannot be *considered* a trustee. I say generally, for I do not mean to say that it is so universally, and I do not know if the crown had the legal estate, how I could have got it out of the crown's hands for the benefit of the *cestui que trust.*"

6 Price Ex. R. 411, 480.

When the crown is a trustee, the Court of Chancery has no jurisdiction to decree a conveyance, but the party must resort to a petition of right; and the court can decree no foreclosure against the crown, nor sale of a legal title when the title is in the crown.

3 Y. & C. Ex. 342. 2 Vesey Sr. 446.

Troy vs. Commonwealth, 127 Mass., 43.

1 Perry on Trusts, pp. 40, 41.

XX.

The State of Tennessee in undertaking to establish a system of internal improvements, by granting to corporations, loans of the bonds of the State bearing interest, and becoming payable at a remote period of time, thus to secure the State, became invested with a lien or mortgage upon the entire property of all of the corporations for the repayment to her of the sums lent. The bonds were sold by the corporations, and not by the State and were payable to no ascertained person, "to bearer." The State did not assign the lien; nor did the corporation guarantee the payment of the bond. The corporations were all domestic, their property within the State, and for every duty exacted of them, performance was required to be made for the State and within the State.

The question is whether upon a failure of the State to pay the interest on the bonds, this Court can decree the payment of this debt, due to the holders of the bonds, should be made by the defendant railroad company, as the borrower of bonds?

Lord Chancellor Selbourne has said in a late case, "It is equally important to maintain the doctrine of trusts which is established in a Court of Chancery, and not to strain it by unreasonable construction beyond its proper limit. There would be no better mode of undermining it than to make unreasonable and inequitable applications of it."

Barnes vs. Addy, 9 Ch. App., 281.

Wilson vs. Bury, 5 G. B. D., 518.

Another Master of Equity has said: "There is one good, general and infallible rule as never deceives. A general rule to which there is no exception: and the rule is that the law never implies, and the Court never presumes a trust, but in a case of absolute necessity."

Cook vs. Fontaine, 3 Swanst., 533.

Citizens Bank vs. National Bank, L. R., 6 H. L., 352.

The Court is invited to give, create, convey, imply, or presume a trust in favor of these plaintiffs. The Court may find it, if it pleases, in the bonds, although the bonds are entirely free from any allusion to one, or any declaration of one. The bonds are not the bonds of the defendant railroad company. The bonds are the bonds of the State, and the State has invested herself with a lien to secure from the railroad company the fulfilment of her obligations to the State; the ultimate result to be the performance by the corporation to the State, of all of her obligations and duties as a borrower of bonds, so that the State should not suffer loss or even inconvenience. Savigny, speaking of this class of issues—bonds of a State—"They are true *quantities;* things which have no individual value. One obligation of a State has absolutely the same value as another of the same kind and amount. They may be placed absolutely in the same rank as money in this point of view, which are distinguishable, however, in their destination. Their end consists in bringing together large sums of money, as they afford to investors an easy and convenient mode of placing their money at interest."

2 Savigny des Ob., sec. 64, p. 268–9.

The obligation of a borrower of bonds is to make payment of his loan in any of these quantities. This obligation may be discharged at the pleasure of the borrower and lender. The lender can never be damaged by a return of the bonds. The State, after

the railroad was completed, would have been relieved by such a return. The construction which the plaintiff contends for would obstruct the policy of the State to liberate herself from debt and to withdraw her bonds from the market.

The aim of the State of Tennessee was to redeem all of the bonds of the State before their maturity. The provision for a sinking fund in the first act of 1852, and the more definite expression in the act of 1856, still more strongly expressed in 1860 and in other acts after the war, leave no doubt of her policy. The preservation of her lien until this was acomplished is found in all of her acts, so that none of these intimate that the holders of her bonds should have any legal right or any authority to enforce that lien. The lien was for the State, through which all of her measures should be validated and made effectual. The exclusiveness of the lien and of the power of the Legislature to enact laws necessary, were the reliance of the State. The terms of the act remind us of the prerogative rights and remedies which are described in the ancient statutes of England, and are commented on in the digests of her laws. The King shall be preferred before any other creditor. By the common law, the King's debtor had protection, so that he should not be sued by other creditors until the debt of the King should be paid. Every person who is anywise chargeable to the King is a debtor to the King, whether it be for debt, duty, damage, or rent in arrear, or other thing, for it shall be taken extensive.

Comyn's Digest, tit. Dett., G., 1, 8.

Giles vs. Grovey, 6 Bligh, N. S., 398–399.

The twelfth section of the act of 1852 is so comprehensive in its terms, and has been so consistently applied in the administration of the State without contention or dispute, that were there more of discrepancy in the statutes than there appears to be, there can be no ground for the impeachment of the settlement by the

defendant railroad company with the State in 1878. The State at that date received her principal and her interest, in full, in her own bonds, upon her own proposition that payment should be so made.

She was liberated from all the debt she had contracted for the account of the defendants.

JOHN A. CAMPBELL,
For Appellee.

XXI.

Has this Court Jurisdiction of this Appeal?

The plaintiff alleges in his bill that he owns six bonds of the State of Tennessee, dated first of January, 1856, and which became payable the first of January, 1892. Record, p. 17. The bonds are Nos. 3623, 3734, 3826, 3879, 4745, 5511. Record, p. 592. According to the statement in the bill there were coupons unpaid from January, 1876, till January, 1879, both inclusive, making forty-two coupons, amounting to $1,260. These bonds were produced by the plaintiff, and one of the number had more of coupons than are mentioned in the bill, and one fewer. At the date of the decree, on the 7th October, 1881, the coupons on these bonds amount to $2,730.

The plaintiff produced at the time of his examination four other bonds that he did not mention in his bill—Nos. 3748, 4630, 4652, 4840. All of the coupons on the ten bonds do not amount to the sum of five thousand dollars, but about $4,550. The bonds are not the bonds of any defendant in this cause, but of the State of Tennessee, and the claim upon the defendants is not a claim for money due by those companies to the State or other person; they are successors in estate. Now the proof is conclusive that on 28th November, 1878, Receiver Neely had paid all of the interest